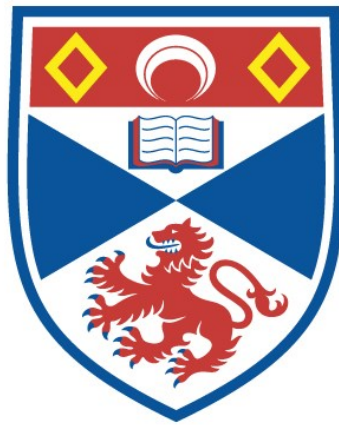


TOWARDS A RATIONAL CHOICE ANALYSIS OF THE
COURT OF JUSTICE OF THE EUROPEAN
COMMUNITIES WITH AN EXAMINATION OF THE
DOCTRINE OF SUPREMACY OF EUROPEAN
COMMUNITY LAW AND ITS ACCEPTANCE BY THE
UNITED KINGDOM AND GERMANY

Mark Killian Brewer

A Thesis Submitted for the Degree of PhD
at the
University of St Andrews



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**Towards a Rational Choice Analysis of the Court of Justice of the
European Communities with an Examination of the Doctrine of
Supremacy of European Community Law and its Acceptance by the
United Kingdom and Germany**

A Thesis Submitted to the Department of International Relations of the
University of St. Andrews in fulfilment of the Requirement for the Degree of
Doctor of Philosophy



Mark Killian Brewer

30 April 1998

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ABSTRACT

Despite an increasing awareness in the field of international relations of the importance of the Court of Justice of the European Communities in the process of European integration, few models have been devised to explain its role. Moreover, those models which have been formulated fail to withstand rigorous analysis. The current thesis examines several of the existing models, critiquing their respective weaknesses. Employing rational choice analysis, this research develops an alternative model, designated the *architect's compromise model*, to explain the role of the European Court of Justice (ECJ) in European integration and the acceptance of its judgements by the Member States.

In addition to the general assumption that the Treaties of the European Communities do not form a constitution for the Communities, five assumptions form the foundation of the architect's compromise model. First, the key actors in the model are the ECJ and the Member States. Second, the actors are assumed to be rational, as defined as undertaking purposeful actions. Third, the ECJ is recognised as a strategic actor, employing a teleological approach to the Treaties of the European Communities. Fourth, the decisions of the ECJ usually conform to the long-term interests of the Member States as defined by the Treaties. Fifth, the Member States can be expected to abide by decisions of the European Court of Justice if its decisions conform to these long-term interests.

To test these assumptions and the architect's compromise model of European integration, the thesis examines the doctrine of supremacy. After analysing supremacy in general, the thesis undertakes case studies on the acceptance of the doctrine of supremacy by the United Kingdom and Germany. Through the testing of the model, the research concludes that the architect's compromise offers an appropriate means of explaining the European Court's role in the process of European integration.

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Chapter I

The European Union, the Court of Justice of the European Communities¹ and

Rationalism

These are the Rights, which make the Essence of Sovereignty; and which are the markes, whereby a man may discern in what Man, or Assembly of men, the Sovereign Power is placed, and resideth. . . .

And because they are essentiall and inseparable Rights, it follows necessarily, that in whatsoever words any of them seem to be granted away, yet if the Sovereign Power it selfe be not in direct termes renounced, and the name of Sovereign no more given by the Grantees to him that Grants them, the Grant is voyd: for when he has granted all he can, if we grant back the Sovereignty, all is restored, as inseparably annexed thereunto.²

Thomas Hobbes, *Leviathan*

We are creating a model, admittedly by reference to inherited principles, but in circumstances so extraordinary that the end result will be unique, without historical precedent. We owe much to the strength of our institutions because our Community is a Community based on the rule of law. And the condition for success is the joint, transparent exercise of sovereignty.³

Jacques Delors, "A Necessary Union"

What depths of illusion or prejudice would have to be plumbed in order to believe that European nations forged through long centuries by endless exertion and suffering, each with its own geography, history, language, traditions and institutions, could cease to be themselves and form a single entity?⁴

Charles de Gaulle, *Memoirs of Hope*

¹ Throughout this study, the Court of Justice of the European Communities will also be referred to as the European Court of Justice (ECJ) or simply the Court (distinguished from other courts examined in this research by being capitalised).

² Thomas Hobbes, *Leviathan*, ed. Richard Tuck, rev. ed. (Cambridge: Cambridge University Press, 1996), 127.

³ Jacques Delors, "A Necessary Union," *The European Union: Readings on the Theory and Practice of European Integration*, eds. Brent F. Nelsen and Alexander C-G. Stubb (London: Lynne Rienner, 1994), 56.

⁴ Charles de Gaulle, *Memoirs of Hope*, trans. Terence Kilmartin (London: Weidenfeld and Nicolson, 1971), 189.

There has been perhaps no event--in the absence of conquest--as significant to the sovereignty of European states than the process of integration which has taken place over the past fifty years. In this, the Court of Justice of the European Communities has played a pivotal role, and an increasing body of literature has sought to explain the impact, the rationale and the significance of the Court's actions. While prior research has added to the overall understanding of legal integration, both friends and foes of the Court concede that critical examination of the behaviour, jurisdiction and decision-making of the European Court of Justice is indeed limited.⁵ Moreover, the few critical examinations of the Court which have been undertaken have often been met with hostile rebuttals which appear to defend the integrity of the Court while not clearly addressing the underlying criticisms. Nevertheless, it is true that much of the criticism aimed at the Court consists of thinly veiled attacks on European integration at large. Regardless of this academic posturing, the current research will argue that Court has not only maintained its standing, but also has carefully constructed the legal framework which has underpinned the success of the European Communities. However, the continued success of the Court depends upon unbiased debate on both its strengths and limitations. Ignoring any weaknesses associated with the Court would eventually undermine its legitimacy, leading possibly, in the end, to serious repercussions for the entire European integration process.

⁵ See, for example, T. Koopmans, "Judicial Decision-making," *Legal Reasoning and Judicial Interpretation of European Law: Essays in Honour of Lord Mackenzie-Stuart*, eds. Angus I. L. Campbell and Meropi Voyatzis (Gospor, Hampshire: Trenton Publishing, 1996), 93-104; and Patrick Neill, *The European Court of Justice: A Case Study in Judicial Activism* (London: European Policy Forum, Frankfurter Institut, 1995).

It must be stated first and foremost that it is not the intent of this research project to analyse the actions of the Court based on legal analysis. On the contrary, this study is concerned with analysing a legal institution based on political science methodology. The purpose in undertaking such an approach is to supplement an area of study that has been largely ignored by political scientists who lack the legal tools possessed by lawyers. Based on the importance of the European Court of Justice throughout the history of European integration and on its continuing pivotal role in the growth of the Communities, political scientists can no longer take refuge from critical analysis of the Court based on a perceived lack of legal training. Moreover, this research project will illustrate that although the Court is first and foremost a legal institution, it nonetheless exhibits a strong *political* influence on the process of European integration. Therefore, we proceed, possibly in a markedly diverse direction from lawyers, but at the very least, it is the hope of this project that it opens the door to more analysis of the Court by political science.

In light of these concerns, this research project strives to objectively provide a rigorous model of European integration which appreciates the political dynamics that undoubtedly underscore the manoeuvrings of the Court. This model, which will be termed the *architect's compromise*, seeks to explain the Court through a rational choice analysis which focuses on the interaction of the Member States and the Court itself. To assess the soundness of such an approach, the model will be tested against selected cases dealing primarily with

the doctrine of supremacy of European law.⁶ This research will argue that the architect's compromise model lends itself particularly well to such analysis as it recognises the bargaining process between the ECJ and the Member States, which plays a significant role in the process of European legal integration. Through this examination, the research will conclude that the architect's compromise model offers the most promising model of integration in this area to date amongst those examined by this research project. Case studies on the United Kingdom and Germany will further verify the strength of the architect's compromise model as a means of explaining European legal integration. Finally, the research will conclude with a discussion of the challenges facing the Court and European integration, identified with the aim of providing both policy prescriptions and areas of further research.

Before the model can be developed, however, it is necessary to first trace the development of the Communities and the philosophical foundation upon which the architect's compromise is based. With that in mind, the first section of this present chapter sketches the historical events which led to the development of the European Communities, followed by an examination of the Court of Justice as an institution. Following a summary of theories of European integration, the chapter will address the potential of rational choice analysis for explaining the process of integration. To develop the foundation for deriving such a model, this chapter will then examine rationalism according to its philosophical roots, its applicability to co-operation and its relevance to

⁶ Throughout this research, the law of the European Communities will also be referred to as European Community law, EC law and simply European law.

international relations. Having explored rationalism, the chapter will then examine game theory vis-à-vis international relations and decision-making. Thereafter, the chapter will examine the ability of a game-theoretic, rational choice analysis to explain the role of the European Court in the process of integration. The final section concludes that such a rational choice analysis provides a rigorous tool for explaining legal integration and introduces the model which will be subsequently developed in Chapter II.

European Integration and Disintegration

Through the centuries, Europe has been characterised by wide political fragmentation. Charlemagne, the Hapsburgs and Napoleon represent but a handful of those who have led campaigns of military conquest in Europe. While the idea of a single Europe has been espoused by imperialistic motives associated with the battlefield, many of the great minds of the continent have also mused upon the idea of a unified Europe with more humanitarian intentions. Drawing upon the apparent civilising effect of the Roman Empire centuries earlier, Pierre Dubois, during the fourteenth century, envisioned a permanent council of European monarchs dedicated to Christian moral workings to ensure peace. With the dawn of the Enlightenment, scholars challenged the divine right of monarchs with its inherent assumption of inequality; moreover, notions of democracy and liberalism provided a new means for European integration based on co-operative and social structures rather than conquest, particularly expressed in the ideas of William Penn,

Jeremy Bentham, Jean-Jacques Rousseau, Henri Saint-Simon and Victor Hugo. Nevertheless, power politics continued to dominate international relations, and as a result, the idea of a unified Europe was unrealised.⁷

Much later, this century's two World Wars exposed the brutality and inhumanity inherent in the traditional nation-state power politics which has dominated international relations since the Peace of Westphalia.⁸ Following the widespread destruction of World War I, the first earnest attempts were made to change the nature of this traditional power politics style.⁹ Furthermore, the high ideals that characterised the Paris Peace Conference (1919) and subsequently led to the formation of the League of Nations "engendered almost limitless hopes and expectations in the minds of a traumatized population craving for assurances that peace would endure."¹⁰ Such high ideals were soon refuted with the rise of nationalism in the 1930s, sowing the seeds of the destruction of the following decade, when the Second World War painfully illustrated the dreadful devastation which could be caused by a European conflict fought with modern weapons. Moreover, World War II clearly illustrated Europe's "drastically altered" position in a world where the global importance of the continent was declining relative to that of the United States and the Soviet

⁷ Derek W. Urwin, *The Community of Europe: A History of European Integration since 1945* (London: Longman, 1991), 1-3.

⁸ Martin Wight asserts that the Peace of Westphalia (1648) provided the state system a legal foundation. For a fuller discussion, see Martin Wight, *Systems of States* (Leicester: Leicester University Press in Association with The London School of Economics and Political Science, 1977), 113-114.

⁹ Walter Hallstein, *United Europe: Challenge and Opportunity* (Cambridge: Harvard University Press, 1962), 5.

¹⁰ William R. Keylor, *The Twentieth-Century World: An International History* (New York: Oxford University Press, 1984), 74-75.

Union. The idea of a unified Europe emerged not only as an attractive alternative to the divisions which had plagued Europe through the centuries, but also as a practical means of retaining political and economic influence in a new global power structure.¹¹ Echoing such thoughts in Zurich on 19 September 1946, Winston Churchill¹² optimistically speculated on the possibility of a united Europe as he remarked, "If Europe were once united in the sharing of its common inheritance, there would be no limit to the happiness, to the prosperity and glory which its three or four hundred million people would enjoy."¹³ Although Europe's economies suffered as a result of the massive destruction of infrastructure sustained during the Second World War, their production capacities, while severely damaged, were in many cases not as devastated as was frequently described by historians. Indeed, many had countries reached pre-War levels by 1950. Nevertheless, by the late 1940s, a sharp decline in Europe's balance of payments, coupled with a poor harvest, helped to mobilise American economic support in the form of the Marshall program, providing nearly \$12.5 billion for European development.¹⁴ It was against this background, along with the deteriorating relations between the United States and the Soviet Union, that French Foreign Minister Robert Schuman on 9 May 1950 outlined a plan for pooling together the French and German coal and steel

¹¹ Hallstein, 5.

¹² Ibid., 8.

¹³ Winston S. Churchill, "The Tragedy of Europe," *Winston S. Churchill: His Complete Speeches, 1897-1963*, vol. 7, 1943-49, ed. Robert Rhodes James (Chelsea House Publishers: New York, 1974), 7379.

¹⁴ Keith Middlemas, *Orchestrating Europe* (London: Fontana Press, 1995), 4-8.

industries, thus making war “not merely unthinkable, but materially impossible.”¹⁵

The Schuman Plan became the foundation of the European Coal and Steel Community (ECSC), the Treaty for which was signed in April 1951. Along with France and West Germany; Belgium, Italy, Luxembourg and the Netherlands formed the initial Community of six, establishing the organisation’s headquarters in Luxembourg.¹⁶ The Preamble broadly outlines the purpose of the ECSC, which is:

To substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundation for institutions which will give direction to a destiny henceforward shared.¹⁷

Practically, the Treaty called for a common market for coal and steel, sought the establishment of rules and regulations for the market and laid the institutional framework for the organs of the ECSC.¹⁸ Included in this framework were a High Authority, a Common Assembly, a Special Council of Ministers and a Court of Justice,¹⁹ institutions which were to mirror those later established under the Treaty of Rome.

¹⁵ Robert Schuman, “The Schuman Declaration,” *The European Union: Readings on the Theory and Practice of European Integration*, eds. Brent F. Nelsen and Alexander C-G. Stubb (London: Lynne Rienner, 1994), 12.

¹⁶ Roy Pryce, *The Politics of the European Community* (London: Butterworths, 1973), 1.

¹⁷ *Treaty Establishing the European Coal and Steel Community (ECSC)*, Preamble.

¹⁸ Pryce, 5.

¹⁹ ECSC, Title 2, Article 7.

Further integrative initiatives were forged among the Members of the ECSC in the latter half of the decade. On 25 March 1957 in Rome, the same six countries signed both the *Treaty Establishing the European Economic Community* (EEC) and the *Treaty Establishing the European Atomic Energy Community* (Euratom), which formally established the institutions on 1 January 1958.²⁰ Envisioning the potential benefits of atomic energy, the Euratom Treaty set out to co-ordinate the development of the nuclear industries in France, Germany, the Netherlands, Belgium, Luxembourg and Italy.²¹ Likewise, the EEC Treaty's aims as outlined in Article 2 are quite formidable:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.²²

Given the limited political power and authority delegated to the European institutions at that time, the achievement of the lofty aspirations of the Treaties would be dependent upon the political will, co-operation and actions of the signatory states.

With the adoption of the three Treaties, the foundation was laid for a Community of European states, and subsequent Treaties²³ have functioned to modify what has since become the European Union. On 8 April 1965 in

²⁰ T. C. Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community*, 2nd ed. (Oxford: Clarendon Press, 1988), 3.

²¹ *Treaty Establishing the European Atomic Energy Community* (Euratom).

²² *Treaty establishing the European Economic Community* (EEC), Article 2.

²³ The other treaties include the Merger Treaty, the *Single European Act*, the Maastricht Treaty and the Amsterdam Treaty.

Brussels, the *Treaty Establishing a Single Council and a Single Commission of the European Communities*, or the Merger Treaty, was signed. Becoming effective on 1 July 1967, the Merger Treaty established one Commission and one Council for the three Communities. In subsequent years, the membership of the European Communities has grown with the acceptance to full member status of Denmark, Ireland and the United Kingdom on 1 January 1973; of Greece in 1981;²⁴ of Spain and Portugal on 1 January 1986,²⁵ and of Austria, Finland and Sweden on 1 January 1995.²⁶ In February 1986, the *Single European Act*, which aimed to clarify constitutional provisions, revitalise the Community and modify certain decision-making procedures, was signed by the Member States although it did not become effective until mid-1987.²⁷ The *Treaty on European Union* was signed on 7 February 1992 in Maastricht²⁸ and contains three "Pillars." Title I, Article A of the Treaty is responsible for transforming the European Communities into the "European Union" by formally assigning the name and outlining its aims, structure and character. The first pillar of the Maastricht Treaty includes the designation of "European Community" as the official name of the EEC (although all three Communities remain separate entities) and reflects the desire by the drafters of the Maastricht Treaty "that the EC should gradually become transformed from an economic community into a

²⁴ Hartley, 4-5.

²⁵ D. Lasok and K. P. E. Lasok, *Law and Institutions of the European Union*, 6th ed. (London: Butterworths, 1994), 17.

²⁶ "Happy on the margins," *The Economist* (3 December 1994): 54.

²⁷ Neill Nugent, William E. Paterson and Vincent Wright, eds., *The Government and Politics of the European Union*, 3rd ed. (London: Macmillan, 1994), 49-50.

²⁸ See *European Union* (Luxembourg: Office for Official Publications of the European Communities, 1994), 8-9.

political union.”²⁹ The second pillar calls for the gradual development of a common foreign and security policy although the importance of inter-governmental co-operation is recognised given that “foreign and security policy. . . is traditionally an area where the Member States insist on retaining sovereignty.”³⁰ The third pillar focuses on “cooperation in the fields of Justice and Home Affairs,” and calls for inter-governmental co-operation particularly in policies among Member States concerning immigration, asylum, drug trafficking, international fraud, customs breaches and international crime and civil matters.³¹ Finally, the most recent treaty, signed on 2 November 1997, is the Amsterdam Treaty, which seeks to address those concerns which have subsequently arisen from Maastricht. Having briefly sketched the historical development and political structure of the Communities, this study will now proceed with its examination of the European Court of Justice.

The Court of Justice of the European Communities

The Court of Justice was founded by the ECSC Treaty³² and subsequently modified in the Euratom Treaty,³³ the EEC Treaty³⁴ and successive Treaties. Although its permanent location was not officially

²⁹ Klaus-Dieter Borchardt, *European Integration: The Origins and Growth of the European Union* (Luxembourg: Office for Official Publications of the European Communities, 1995), 59.

³⁰ Ibid., 60.

³¹ Ibid., 62.

³² ECSC, Articles 31-45 and Protocol on the Statute of the Court of Justice of the European Coal and Steel Community.

³³ Euratom, Articles 136-160 and Protocol on the Statute of the Court of Justice of the European Atomic Energy Community.

³⁴ EEC, Articles 164-188 and Protocol on the Statute of the Court of Justice of the European Economic Community.

designated until 1992, the Court has always convened in Luxembourg, which “is one factor in helping to give the Court a strong *esprit de corps*.”³⁵ As the Member States wished to limit duplication of institutional tasks and structure among the Communities,³⁶ the *Convention on Certain Institutions Common to the European Communities* was signed on 25 March 1957.³⁷ Article 3 is responsible for establishing a single Court of Justice for the EEC and Euratom,³⁸ and the first paragraph of Article 4 states that:

Upon taking up its duties, the single Court of Justice referred to in Article 3 shall take the place of the Court provided for in Article 32 of the Treaty establishing the European Coal and Steel Community. It shall exercise the jurisdiction conferred upon that Court by that Treaty in accordance with the provisions thereof.³⁹

Thus, the European Court of Justice, which presently consists of fifteen judges and nine advocates general, has from the beginning been a single institution common to all three Communities. The judges, with terms of six years, are appointed by the unanimous consent of the Member States,⁴⁰ which helps ensure impartiality and credibility from the judges.

The responsibilities of the Court lie in ensuring “the interpretation and application” of the three treaties.⁴¹ Having had its remit enlarged by the *Treaty on European Union*, the Court derives its responsibilities solely through the

³⁵ Stephen Weatherill and Paul Beaumont, *EC Law: The Essential Guide to the Legal Workings of the European Community*, 2nd ed. (London: Penguin Books, 1995), 155.

³⁶ *Convention on Certain Institutions Common to the European Communities*, Preamble.

³⁷ *Convention on Certain Institutions Common to the European Communities*, Final Provisions, Article 8.

³⁸ *Ibid.*, Section II, Article 3.

³⁹ *Ibid.*, Section II, Article 4.

⁴⁰ Weatherill and Beaumont, 155.

⁴¹ ECSC, Article 31; EEC, Article 164; and Euratom, Article 136.

collective Treaties that form the European Communities. Thus, the Communities' jurisdiction is derivative in nature, in contrast to that of the Member States, whose authority is characteristically attributed to their respective peoples or parliaments. However, Lasok and Lasok maintain that "... the Court may feel justified in adopting a broad interpretation of attribution and behave like a supreme court of a federal state which occasionally has to make a political decision whilst interpreting the constitution,"⁴² to fulfil its role of "filling in the gaps" of the Treaties. Through such landmark rulings as *Van Gend en Loos*,⁴³ which established the principle of "direct effect" (national courts must enforce the obligations or recognise the rights implicit in European legislation); *Francovich v. Italy*,⁴⁴ which recognised the rights of citizens to receive financial compensation should they be adversely affected by the failure of a Member State to enact a particular directive in a certain amount of time; and *Cassis de Dijon*,⁴⁵ which established the principle of "mutual recognition" (lawfully manufactured and traded products of any particular Member State must be recognised by any other Member State), the Court has greatly enhanced the prestige of European Union law in the process of European integration.⁴⁶ Thus, the Court has functioned as an engine of European integration, playing a fundamental role in the process.

⁴² Lasok and Lasok, 251.

⁴³ Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, *European Court Reports* (1963): 1-30.

⁴⁴ Cases C-6/90 & 9/90, *Andrea Francovich and Another v. The Republic (Italy)*, *Common Market Law Reports* 2 (1993): 66-116.

⁴⁵ Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, *European Court Reports* 1 (1979): 649-675.

⁴⁶ See further Nugent, Paterson and Wright, 219-222.

Theories of Integration

European integration has traditionally been explained through the theories of federalism, functionalism or neofunctionalism. While it is not the intention of this study to simply repeat old ground, it is useful to roughly sketch these well-known theories of integration, which will enable us to identify their respective weaknesses, illustrating the necessity for a more robust explanation. According to the ideas of Altiero Spinelli, European integration would best be achieved through federalism. Correspondingly, Spinelli envisioned an autonomous "movement for the European federation" that would, through popular support, achieve such unification "by the free decisions of democratic national governments."⁴⁷ Furthermore, Spinelli argued that integration could only be achieved through a popularly elected European assembly, rather than through inter-governmental methods, which reflected his scepticism of functionalism.⁴⁸ Federalism is of importance to this research since many experts on the ECJ, including Joseph Weiler, assume that the European legal system is federal in structure. This research refutes such rigid a classification based on the reasons which will be developed throughout this study, particularly relating to the Communities' lack of a true constitution, as will be explored at length in Chapter III.

⁴⁷ Sergio Pistone, "Altiero Spinelli and the Strategy for the United States of Europe," *Altiero Spinelli and Federalism in Europe and in the World*, ed. Lucio Levi (Milan: Franco Angeli, 1990), 133-134.

⁴⁸ *Ibid.*, 133-140.

In contrast to Spinelli, David Mitrany argues that both a federation and a loose confederation would be impractical as a means of reorganising the international system. With regard to his arguments as to the unsuitability of a loose confederation, Mitrany cites the example of the League of Nations' "attempt to universalize and codify the rules" of international conduct despite its lack of political support from the leading members.⁴⁹ Moreover, with regard to a federation, Mitrany is equally sceptical, stressing that federations require close association, which might be appropriate for provincial units seeking to form a national unit, but inappropriate for those regions where "none of the elements of neighbourhood, of kinship, of history, are there to serve as steps."⁵⁰ Convinced that neither federation nor confederation provides a practical alternative, Mitrany argues that functionalism, or integration by sector, is more promising. Applying such reasoning with regard to the Communities, Mitrany states, "A constitutional pact could do little more than lay down certain elementary rights and duties for the members of the new community. The community itself will acquire a living body not through a written act of faith but through active organic development."⁵¹ In this way, Mitrany argued that functionalism would bring co-operation in the functional tasks among states and thus make peace more likely.⁵² Despite Mitrany's faith in the functionalist explanation, it was not long before analysts were once again formulating alternative notions as to the best path towards integration.

⁴⁹ David Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization* (London: Oxford University Press, 1943), 8.

⁵⁰ *Ibid.*, 6.

⁵¹ *Ibid.*, 10.

⁵² *Ibid.*, 19-56.

Recognising the shortcomings of functionalism, Leon Lindberg advanced the theory of neofunctionalism specifically for European integration. According to neofunctionalism, central political actors pursue an active role in encouraging integration. Member States must then embrace the desire to integrate, with spillovers (integration in one sector leading to integration in another) playing an important role in integration.⁵³ Neofunctionalism assumed a sectoral approach to integration at a regional level, in which an organic growth of institutions would eventually bring about the integration of several states. As with federalism and functionalism, neofunctionalism came under severe scrutiny because conditions in Europe did not reflect the predictions of the theory. While neofunctionalism has contributed immensely to understanding European integration, it falls short of providing a definitive theory. According to A. J. R. Groom,

. . . this sustained intellectual effort by scholars in the United States to elaborate and test neofunctionalism has been one of the major achievements in the study of international relations since the war. It is one of the principal reasons why integration theory has been a growth area in the discipline [;however,] . . . the model is a good explanation of the Western European integration process of the fifties and early sixties, but it is less applicable to the more recent experience in Europe and elsewhere.⁵⁴

Even Ernst Haas, one of the pioneers in developing neofunctionalism, declared integration theory (read neofunctionalism) “obsolescent” as a means of explaining “the behavior patterns actually displayed by governments active in

⁵³ Leon N. Lindberg, *The Political Dynamics of European Economic Integration* (Stanford: Stanford University Press, 1963), 3-13.

⁵⁴ A. J. R. Groom, “Neofunctionalism: A Case of Mistaken Identity,” *Political Science* 30, no. 1 (July 1978): 21.

regional organizations.”⁵⁵ Briefly, as the weaknesses will be examined more fully in Chapter II, it is sufficient to note that Haas attributes the obsolescence of neofunctionalism to the fact that several of its primary assumptions were no longer valid.⁵⁶ Whilst the above theories are the most acknowledged theories in European integration,⁵⁷ it has been demonstrated by a number of analysts (most spectacularly, Haas) that these models suffer from inadequacies in explaining the integration of the European Communities. In light of these concerns, there is a necessity for alternative explanations. This research proposes one such alternative: rational choice analysis, and the remainder of the chapter will examine the suitability of this model for analysing the ECJ and the manner in which the Member States accept EC law into their domestic legal systems.

Towards a Rational Choice Analysis

Since its origin, the European Court of Justice has forged an impressive body of Community law and has formalised the basic doctrines of its jurisdiction, most notably, for this analysis, those of direct effect and supremacy. At different times throughout its lifetime, the Member States have displayed enthusiasm, apathy and hostility towards the Court with regard to its stated obligation of interpreting the Treaties. Yet, despite the periodic tensions between the Court and the Member States, European law has nonetheless

⁵⁵ Ernst B. Haas, “Turbulent Fields and the Theory of Regional Integration,” *International Organization* 30, no. 2 (1976): 173.

⁵⁶ *Ibid.*

⁵⁷ For an overview of European integration theory, see Charles Pentland, *International Theory and European Integration* (London: Faber and Faber Limited, 1973).

functioned as a motor of European integration, as this study will demonstrate. The Court, however, has experienced limitations to its authority. In particular, the political significance of its decisions has often functioned to prevent the Court from actively engaging in the judicial activism of which it has so spectacularly been accused.⁵⁸ Much of traditional integration theory focuses on the organic growth of the Communities along the neofunctionalist view that growth in one sector leads to growth in another. As Geoffrey Garrett points out, the idea of a self-perpetuating Union alone does not adequately explain integration. According to Garrett:

Conventional theories of international cooperation are not well suited to analyzing the internal market. More importantly, analysts have tended to assume a functional orientation, arguing that the agreements and institutions which emerge represent uniquely efficient solutions to common problems. The lexicon of collective action problems is helpful in delineating both the general environment in which cooperative solutions may emerge and the general institutional forms that such solutions may take. This approach, however, downplays the fundamental political nature of most bargaining over cooperative agreements.⁵⁹

More realistically, this bargaining between the actors (the Member States and even the Court itself) reflects a self-interest by all actors in which each attempts to achieve the greatest payoff through rational decisions. In contrast to many integration theories which focus an inordinate amount of attention on institutional dynamics, one of the primary arguments of this research project is

⁵⁸ See, for example, Hjalte Rasmussen, "Between Self-Restraint and Activism: A Judicial Policy for the European Court," *European Law Review* 13 (1988): 28-38; and Patrick Neill, *The European Court of Justice: A Case Study in Judicial Activism* (London: European Policy Forum, 1995).

⁵⁹ Geoffrey Garrett, "International Cooperation and Institutional Choice: The European Community's Internal Market," *International Organization* 46, no. 2 (Spring 1992): 559.

that the most appropriate model of European integration vis-à-vis the Court and the Member States should focus on their interactions and upon the political limitations under which the Court operates. To provide such an explanation, this research will derive a game-theoretic, rational choice model which incorporates such political concerns that undoubtedly face the Court. Before this particular approach is applied to the role of the European Court of Justice, however, the concept of rationality as it applies to rational choice theory and game theory will be defined to provide a foundation upon which to subsequently construct the model.

The Philosophical Roots of Rationalism

The concept of rationality rests upon rich philosophical foundations, of which at least a rudimentary discussion is warranted. Without prior knowledge, humans seek order through adding intellect to perception. Through perception and intellect, humans identify basic concepts of the natural world, including substance, quality, quantity, cause, space and time. Moreover, intellect allows humans to perceive themselves and those around them. The concepts of “I” and “mine” contrast with the concepts of “you” and “yours.” Thus, intellect adds an awareness of individuals and the larger world to human perceptions.⁶⁰

Likewise, the concept of freedom proceeds from reason. With the appreciation of their individuality coupled with an understanding of the

⁶⁰ Michael Donelan, *Elements of International Political Theory* (Oxford: Clarendon Press, 1990), 56-57.

individuality of those around them, humans recognise their freedom of action. However, reason also functions to restrict freedom because from reason, humans recognise a moral law--one accepted by free will. Accordingly, humanity generally accepts this moral law since reason gives rise to a recognition of the legitimacy of others, and adherence to the moral law protects freedom, while violation of the moral law results in the enforcement of its penalties upon the violator.⁶¹

Although the concept of morality can be defined in fundamentally different manners, the “morality of individuality” as explained by Michael Oakeshott is particularly relevant to rationalism. Oakeshott explains that the individual possesses the “disposition to make choices for oneself to the maximum possible extent, choices concerning activities, occupations, beliefs, opinions, duties and responsibilities,” and morality is the approval of this “self-determined conduct” for humans; hence, they strive towards “the conditions in which it may be enjoyed most fully.” Therefore, morality, at the lowest level, consists of following one’s own self-interests and fully respecting the right of others to do the same.⁶² In this manner, morality is linked to the respect for others that rationality demands.

By its very nature, Oakeshott’s explanation of morality cultivates a culture of individuality. According to Oakeshott, by the seventeenth century,

⁶¹ Ibid., 57.

⁶² Michael Oakeshott, *Morality and Politics in Modern Europe: The Harvard Lectures*, ed. Shirley Robin Letwin (London: Yale University Press, 1993), 20-21.

“almost all ethical writing. . . begins with the hypothesis, not of a community of human beings, but of an individual human being choosing and pursuing his own directions of activities and belief.” Consequently, the task was to explain the nature of interaction among the separate humans and any obligations inherent in such interaction. Finally, Oakeshott summarises that “the moral law is to acknowledge each man as an independent personality and to regard him not as a means but as an end in himself.”⁶³ Hence, such recognition of individuality and free will translates into the assumption that humans will pursue the actions which best maximise their respective goals.

Rationalism: A Means to Co-operation

To fully understand rationality, the ideas of John Locke and Immanuel Kant and, subsequently, the social contract, in particular, deserve mention. Along with the concept of freedom, rationality implies the idea of the equality of humankind. Cicero acknowledges that “nothing is so one to one similar, so equivalent, as all of us are to each other.”⁶⁴ Evidence of this equality lies in the sheer idea of power. Thomas Hobbes points out that humans have the same ability to kill each other, separated solely by who is stronger and who is weaker. Recognising this vulnerability, no doubt, provides compelling evidence for the equality of humanity. Such an appreciation of both freedom and equality forms the basis of society and its moral law,⁶⁵ a moral law “radiat[ing] from a source

⁶³ Ibid., 21-23.

⁶⁴ Donelan, 57.

⁶⁵ Ibid.

that transcends earthly power,” which human reason recognises the necessity to obey.⁶⁶ John Locke explains that humanity is “equal and independent” and thus “. . . no one ought to harm another in his life, health, liberty or possessions.” Immanuel Kant argues that freedom and equality are the very values that suggest humans should act towards others in the manner in which they desire to be treated themselves.⁶⁷ Locke further argues that since men and women are reasonable, even without a common authority, or government, they live by the rules of reason.⁶⁸ Hence, morality can be thought to flow from the, particularly Kantian, idea that humans reason it to be in their best interests to treat others in the manner in which they would like to be treated.

Hence, although rationalism concedes that man or woman is “manifestly a sinful and bloodthirsty creature,”⁶⁹ the reliance of humanity on reason cultivates a “harmony of interests.”⁷⁰ Rawls explains human nature as primarily self-serving and that one works “to achieve his own greatest good, to advance his rational ends as far as possible.”⁷¹ Rawls not only identifies the individual as an appropriate level of analysis for assuming that one works to achieve one’s greatest good, but he also argues that the same logic holds for groups.⁷² Conflict, consequently, is a negative force since it impedes progress, and

⁶⁶ Martin Wight, *International Theory: The Three Traditions*, eds. Gabriele Wight and Brian Porter (London: Leicester University Press for the Royal Institute of International Affairs, 1991), 14.

⁶⁷ Donelan, 57.

⁶⁸ Wight, *International Theory*, 14.

⁶⁹ *Ibid.*, 13.

⁷⁰ Ian Clark, *The Hierarchy of States: Reform and Resistance in the International Order* (Cambridge: Cambridge University Press, 1989), 54.

⁷¹ John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), 23.

⁷² *Ibid.*, 23-24.

rationalists argue that the progress of one ultimately has beneficial effects upon others. Thus, dissidence is “unreasonable” and “impoverishes” humanity.⁷³ Moreover, human beings, while possessing no objective obligations to one another except those assumed in their best interests, refrain from injuring others, which cultivates the “harmony of interests.”⁷⁴

Rationalism and International Relations

In a wider sense, the idea of a “harmony of interests” spills over into international relations. Rationalism is immensely concerned with “the element of international intercourse” in the anarchic world.⁷⁵ However, the rationalist does not adhere to a world government as compatible with the “harmony of interests.” Rather, diversity is celebrated as a means to protect freedom and equality since different societies each formulate their own designs for the protection of liberty. Likewise, the existence of many distinct societies guards against the seizure of a single world government by irrational humans.⁷⁶

Moreover, an appreciation for the political process is inherent in the rationalist idea of governance. All members of the society have the responsibility to ensure that freedom and equality are not impeded. Thus, each person makes rational choices to maximise his or her position within society vis-à-vis the social contract.⁷⁷ While the members of society have the responsibility

⁷³ Donelan, 58.

⁷⁴ Ibid., 58-59.

⁷⁵ Wight, *International Theory*, 13.

⁷⁶ Donelan, 59.

⁷⁷ Ibid., 60.

to obey the moral law, they also possess the intellect to reason which actions they should pursue in order to achieve the greatest benefits.

Likewise, the separate actors within the international community make rational choices to maximise their positions. For example, the reasoning that underlies the notion of a Prisoners' Dilemma⁷⁸ in game theory may be used to examine the decisions faced by states. In this well-known illustration, two suspects are apprehended by the police and questioned separately concerning the same crime. According to their behaviour under questioning, they can expect certain outcomes. Should they both deny the allegations or remain silent under questioning, they can expect that the maximum sentence they would receive is one for vagrancy, which would result in 30 days in the local jail. However, if both confess, they could expect to be sentenced for four to six years, with the possibility of parole after the fourth year. Conversely, if one remains silent while the other confesses they both committed the crime, the confessor would receive a sentence of six months whilst the other would serve eight years in the state penitentiary. Hence, the ideal situation (from the suspects' point of view) would be to both remain silent under questioning or to deny the charges as this would result in a 30 day sentence. Yet, one important aspect of the Prisoners' Dilemma model is that the prisoners are not allowed to communicate. Without communication, one cannot have confidence that the other will remain silent. The prisoners, therefore, reason that, by confessing, they will limit their sentences to a maximum of six years, rather than risking the

⁷⁸ For a basic examination of Prisoners' Dilemma, see William Poundstone, *Prisoner's Dilemma* (Oxford: Oxford University Press, 1992).

possibility of serving eight years. By doing so, they forego the possibility of the optimal sentence (30 days) and are thus guaranteed a more unfortunate fate as a result of the uncertainty inherent in the rules of the game.⁷⁹

Using the Prisoners' Dilemma as a model, states--faced with international anarchy and competing interests--act in a manner that will bring the greatest returns. Furthermore, states, directed by their separate self-interests, do co-operate, if collective actions also maximise their position.⁸⁰ Thus, rationalism does not solely regard international relations as a zero-sum game. Rather, it is assumed in rationalism that states seek the greatest possible payoff, whether it can be obtained unilaterally or through international co-operation.

At the heart of this whole argument is exchange theory,⁸¹ which concentrates on scarcity and competition between rational actors. Such logic offers a justification for international institutions since states agree to co-operate with one another only for potential gains. The proliferation of international institutions suggests that apparent benefits are derived from membership in such organisations. However, the costs involved--chiefly compromising sovereignty--must be weighed against the potential benefits. While even a minor retreat of state autonomy as the prerequisite to membership in an international institution often proves difficult for states to accept, international organisations provide

⁷⁹ The Prisoners' Dilemma illustration is adapted from James E. Dougherty and Robert L. Pfaltzgraff, Jr., *Contending Theories of International Relations: A Comprehensive Survey*, 3rd ed. (New York: Harper Collins Publishers, 1990), 512-513.

⁸⁰ Charles W. Kegley, Jr., *Controversies in International Relations Theory: Realism and the Neoliberalism Challenge* (New York: St. Martin's Press, 1995), 158-159.

⁸¹ For a discussion of exchange theory, see Anthony Heath, *Rational Choice and Social Exchange* (Cambridge: Cambridge University Press, 1976).

stimuli for co-operation by limiting transaction costs and minimising uncertainty. Specifically, international organisations foment co-operation by providing channels of communication and institutionalising networks of interaction between member countries. Before these issues can be further explored, it is necessary to examine the pertinence of game theory to international relations. This will enable us to subsequently construct the alternative model based on rational choice assumptions for explaining the ECJ and the reception of EC law by the Member States.

The Relevance of Game Theory in International Relations

As states vie for an elevated position in world politics, each individual government can be described as being engaged in a political and economic game for superiority. A game-theoretic analysis of such behaviour has its roots in the pioneering work by Zermelo 1913, Borel in 1921, von Neumann in 1928, von Neumann and Morgenstern in 1944 and scholars at Princeton University during the Second World War.⁸² Von Neumann and Morgenstern have shown “that for any rational decision-maker there must exist some way of assigning utility numbers to the various possible outcomes that he cares about, such that he would always choose the option that maximizes his expected utility,” a central assumption of game theory.⁸³ Myerson defines game theory “as the study of mathematical models of conflict and co-operation between intelligent rational

⁸² Roger B. Myerson, *Game Theory: Analysis and Conflict* (Cambridge, Massachusetts: Harvard University Press, 1991), 1.

⁸³ *Ibid.*, 2-3. Actually, Bernoulli established the initial groundwork for von Neuman and Morgenstern two hundred years earlier.

decision-makers.”⁸⁴ With regard to international relations, these models can be used to analyse the games countries play to achieve the greatest political and economic positions. Underlying this whole approach is the idea that the *game* is “any social situation involving two or more individuals,” while those engaged in the game are known as the *players*, who are assumed to be both rational and intelligent to the extent that they make “decisions consistently in pursuit of. . . [their] own objectives.”⁸⁵

To fully understand game theory, it is necessary to establish the basic assumption of instrumental rationality. In short, instrumental rationality implies that individuals have preferences over particular choices and that decisions are regarded as rational because the individuals select the choices which appear to maximise their preferences. Heap and Varoufakis explain that “rationality is cast in a means-end framework with the task of selecting the most appropriate means for achieving certain ends (i.e. preference satisfaction); and for this purpose, preferences (or ‘ends’) must be coherent in only a weak sense that we must be able to talk about satisfying them more or less.”⁸⁶ While game theory is characteristically associated with instrumental rationality (decisions of groups or institutions are the results of bargaining between individuals),⁸⁷ it is also possible to identify other actors, such as governments, institutions and organisations, as the level of analysis for game theory. As long as an actor has a consistent set of

⁸⁴ Ibid., 1.

⁸⁵ Ibid., 2.

⁸⁶ Shaun P. Hargreaves Heap and Yanis Varoufakis, *Game Theory: A Critical Introduction* (London: Routledge, 1995), 5.

⁸⁷ See Peter C. Ordeshook, *Game Theory and Political Theory: An Introduction* (Cambridge: Cambridge University Press, 1986), 1.

preferences, it is possible to assume instrumental rationality.⁸⁸ Since this research will derive a model to examine European integration and the European Court of Justice based on game-theoretic assumptions, it is necessary to explore such conventions of game theory more thoroughly.

Decision-making in Game Theory

Implicit in game theory is the notion that the players are independent although their conduct carries ramifications for the entire group. Hence, the actions of one player are interpreted not only according to that actor's desired goals, but also in relation to the entire group. Since the actor is faced with a series of separate choices, it is possible to denote the set of possible actions as A , where a_z represents one of the possible actions within the set. Thus, the possible conduct of the actor is represented where $A = \{a_1, a_2, \dots, a_z, \dots\}$. Finally, it should be noted that each action within the set A is both *exhaustive*, in the sense that one action must be chosen, and *mutually exclusive*, with respect that only one action can be selected.⁸⁹

Players engage in purposeful actions to produce desired outcomes. This will subsequently be illustrated with regard to the ECJ and the Member States; however, for the moment, it is necessary to further explore the notation of such an approach. As with actions, outcomes can also be represented by a set, where

⁸⁸ Heap and Varoufakis, 5. See also note in Donald P. Green and Ian Shapiro, *Pathologies of Rational Choice Theory: A Critique of Applications in Political Science* (New Haven: Yale University Press, 1994), 16.

⁸⁹ Ordeshook, 2-3.

$O = \{o_1, o_2, \dots, o_z, \dots\}$. In such a set, a particular outcome is represented by o_z , and, as with actions, outcomes within the set are both mutually exclusive (only one element in the set corresponds with the outcome) and exhaustive (the set must contain all possible outcomes, of which one must occur). Additionally, the data in both sets A and O can be represented geometrically. Through plotting the contents of sets A and O graphically, conclusions may be drawn upon the courses players pursue.⁹⁰

While the descriptions of sets A and O illustrate the range of decisions faced by players, it is necessary to know the nature in which A and O are linked. Providing the correlation between the action and outcome, and ultimately answering which outcome results when a particular action is undertaken, is the *state of nature*. In short, the state of nature refers to all the possible factors that surround the decisions of players as they deliberate their actions. As with actions and outcomes, the state of nature can also be represented by a set, where $S = \{s_1, s_2, \dots, s_z, \dots\}$. Once again, the contents of set S are both exhaustive and mutually exclusive.⁹¹ With regard to international relations, adopting such notation allows a particular model to account for a range of different political circumstances. Taken together, the sets O, A and S provide a useful means to predict the courses of action players adopt and the outcomes that are thus produced. This methodology lies at the foundation of the model

⁹⁰ Ibid., 4-5. For an explanation and example of graphing actions and outcomes, see pages 4-9.

⁹¹ Ibid., 9.

which this research will derive in Chapter II to analyse the European Court of Justice's role in European integration.

As can be assumed from the above discussion, the actions of one player often affect the others, determining whether it will be a zero-sum or a non-zero-sum game. Specifically, a zero-sum game contains both a definite winner and a definite loser, since the gains and losses must equal zero. In terms of state behaviour, the concept of a zero-sum game can be conveniently illustrated in the case of a military conquest in which one side gains territory at the expense of the other. While one might argue that the casualties sustained appear to negate the idea of a zero-sum, game theory differentiates between the *payoff*, or the "value attached by a player to an outcome," and the *outcome*, which can be described as either "win, lose, or draw."⁹²

Conversely, there are games in which one player's gains do not equal another's losses. These non-zero-sum games involve two or more players and can be characterised by co-operation or conflict or by both. At each step of the game, all players might make gains, and the end of the game could bring gains for each player. Frequently, non-zero-sum games are characterised by a variety of payoffs, which sometimes vary considerably. With regard to international relations, such non-zero-sum games may occur when several countries enter a co-operative arrangement in which they may all receive benefits. The nature of these payoffs is related to the level of either co-operation which is achieved or

⁹² Dougherty and Pfaltzgraff, 508.

conflict that exists between the players.⁹³ Having reviewed the fundamental elements of game theory, it is now appropriate to examine its relevance to the European Court of Justice.

Game Theory as a Means of Analysing the European Court

Since the theoretical framework of a particular game can be designed to mirror the structure of the institutional framework in which the ECJ and the Member States interact, game theory is able to reflect the constraints of the relations between the Court and the Member States. Moreover, Schlenker and Bonoma have noted that game theory embodies four major similarities to reality.⁹⁴ First, each situation holds several alternatives for each actor, and these choices are finite, which implies the actor must choose one of the alternatives. Second, each player can reasonably estimate the impact of his or her decisions on certain matters; however, he or she cannot know the eventual outcomes the interaction might produce. Thus, the actor must pursue the action which *appears* to maximise his or her goals. Third, the decisions of one player are directly influenced by the actions of others, which explains the existence of uncertainty amongst the players. This implies that the actions of each player are largely determined “by the intersection of the behavioral strategies elected by each.” Fourth, rules are established to restrict the behaviour of the players vis-

⁹³ Ibid., 511.

⁹⁴ Barry R. Schlenker and Thomas B. Bonoma, “Fun and Games,” *Journal of Conflict Resolution* 22, no. 1 (March 1978): 11. These four assertions form the basis for a later discussion of the suitability of evaluating the interactions between the Member States and the ECJ through game theory.

à-vis the group. Thus, the actors' choices of action are further limited by either the formal or informal rules or norms that characterise their interaction. Through sharing these basic--yet important--qualities, games and society can be regarded as quite similar, and thus game theory can go a long way to explaining relations amongst states.⁹⁵ More specifically, the interactions between the ECJ and the Member States are reflective of these four propositions since they are engaged in a two stage process in which the Member States initially determine the broad guidelines for European Community law, while the ECJ is responsible for filling in the gaps of this broad blueprint.

In evaluating the merits of rational choice theory, the European Court of Justice provides an interesting study. Geoffrey Garrett has employed a particular rational choice model for examining the Court,⁹⁶ and while the current research will outline the weaknesses and deviate from Garrett's specific assumptions and reasoning in Chapter II, Garrett's overall approach is nonetheless appropriate as a means to examine the European Court of Justice. Hence, an examination of Garrett's justification for employing such an approach is warranted. According to Garrett, the laws of the European Communities do exert a more significant constraint upon the Member States than most other types of international law. Garrett states that legal scholars may argue that the importance of EC law has come as a result of inattention by the Member States' governments. Correspondingly, Garrett cites Eric Stein's speculation that politicians have regarded most of the legal decisions within the development of

⁹⁵ Ibid.

⁹⁶ Garrett, "International Cooperation."

the European Union as too “technical” and thus the responsibility of legal experts, who have enjoyed great latitude in the formation of legal principles within the Communities.⁹⁷ According to Stein, “Although all member governments have a legal right to be notified of any proceedings referred to the Court under Article 177 and to state their views, relatively few have taken advantage of the opportunity, and they did so in most instances only if their national law or other interest was directly involved.”⁹⁸ Garrett further explains that legal experts may argue that the benefits of modifying European law did not merit the costs; however, Garrett correctly points out that this explanation is less than completely persuasive since the Member States had the opportunity to adjust Community law during the negotiations of the *Single European Act* and did not choose to do so.⁹⁹

In response to the arguments by legal scholars, Garrett argues that a desire by the separate Member States to maintain the EC legal system suggests a greater explanation for the importance of, and reverence for, EC law by the Member States. Thus, this line of reasoning regards the system of European law to be “consistent with the interests of member states,” as it allows for “monitoring” of members and helps to alleviate the “incomplete contracting problems confronting the EC members.”¹⁰⁰ Garrett further argues that contrary

⁹⁷ Ibid., 556.

⁹⁸ Eric Stein, “Lawyers, Judges, and the Making of a Transnational Constitution” *American Journal of International Law* 75 (1981): 26.

⁹⁹ Garrett, “International Cooperation,” 556.

¹⁰⁰ Ibid., 556-557. “Incomplete contracting problems” arise as a result of the general nature of the EU Treaties, and the Court provides a means for equitable decisions to be reached on issues not specifically outlined in the Treaties.

to conventional analysis of co-operation, the Member States will not necessarily establish a set of absolute rules from the beginning and that adherence or violation of rules will not be transparent.¹⁰¹

Even though Member States might prefer to ignore certain European policies, the fact that the rules of the Communities constrain the actions of the whole group for the collective benefit commands loyalty. Thus, the actions of a free-rider would be apparent and would result in punishment by the complying Members through the organs of the Communities. Hence, states are motivated by the threat of penalties to comply with the rules of the European Communities. However, the uncertainty and complexity that characterises the Communities, given their rather young age and broad scope of responsibilities, would, in the absence of some regulatory body, possibly have a detrimental impact upon the stability of the single market. Furthermore, states would face the great temptation of cheating if there were no monitoring body.¹⁰²

The European Court of Justice acts as such a monitoring body, which greatly enhances the legitimacy of the European Communities. Initially, the ECJ functions as a monitor of the actions by the Members, identifying breaches of EC law. Thus, the threat of public rebuke of transgressor states by the Court deters cheating. Likewise, the drafting of national law which contradicts EC regulations or the failure to comply with commitments would most likely be met with embarrassing public rebuke for the violating country by the Court.

¹⁰¹ Ibid., 557.

¹⁰² Ibid.

According to Garrett, although the SEA recognises the possibility of Member States “passing statutes that transparently violate their EC commitments,” it is deterred by “the ability of the EC legal system to paint scarlet letters on transgressors.”¹⁰³

Besides its monitoring role of the trade between the Member States, the ECJ also functions to mitigate “the incomplete contracting problems” in the Communities. To explain, as the Communities are built on a foundation of general principles, rules and regulations, the legal framework is not equipped to address every possible issue that might arise. While the *Single European Act* recognises the responsibility of the Council of Ministers to pass directives aimed at adding specifics to the broad framework of European law, the national courts of the Member States and the ECJ assume the role of interpreting these “guidelines” from the Council. Garrett concludes: “The EC legal system provides a mechanism through which the types of general agreements about the rules of the game supplied by the EC treaties and internal market directives can be applied to the myriad interactions that constitute the EC economy.”¹⁰⁴

Additionally, Garrett argues that the ECJ behaves in such a manner to add legitimacy to its actions despite its “institutional weaknesses.” Thus, the ECJ appears to mirror the collective interests of the Member States. Accordingly, if the Court wishes to maintain its “authority, legitimacy, and independence,” it must render decisions that will most likely *not* be overturned.

¹⁰³ Ibid.

¹⁰⁴ Ibid., 557-558.

Therefore, the actions of the judicial system become “political,” as it is aware that intervention by “other political actors” could undermine its legitimacy should it render decisions that are not amenable to the principal authorities. Due to the facts that the ECJ lacks a written constitution and is composed of justices nominated or selected by the Member States and who face re-appointment every six years, “the court must be fearful . . . [of] a coordinated attack on its behavior and competencies--through systematic noncompliance or, at the extreme, through a treaty revision.”¹⁰⁵ Garrett also points out that “the Court of Justice is . . . a strategic actor that takes into account the anticipated responses of national governments before it decides cases brought before it. The court will likely rule against governments in cases where it expects the government ultimately to accept the decision.”¹⁰⁶ Although this research will deviate from Garrett’s model, addressing its weaknesses in the next chapter, it also recognises the suitability of analysing the European Court through a rational choice approach. Specifically, the two-level, bargaining structure which characterises the dichotomy between the ECJ and the Member States will form the basis of the model which will be derived in the next chapter.

Rational Choice and the Court: A Review and Preview

This study argues that traditional theories of integration have fallen short in their explanations and that the use of rational choice analysis may offer insight

¹⁰⁵ Ibid., 558.

¹⁰⁶ Geoffrey Garrett, “The politics of legal integration in the European Union,” *International Organization* 49, no. 1 (Winter 1995): 180-181.

into a greater understanding of the ECJ's role and impact on the process of integration in Europe. First, this approach recognises the existence of several, self-interested players. Both the Court itself and the separate national governments vie for the best possible outcome despite the fact that the rational decisions motivated by their respective goals do not necessarily translate into their preferred outcomes. Furthermore, the Court works to guard its interests, which is in keeping with the idea of the Court as a strategic actor. Thus, the Court and the Member States are engaged in a bargaining process whereby the Member States and the Court interact with each other, attempting to secure their respective aims through the Communities. Second, the Court's "democratic deficit,"¹⁰⁷ coupled with apathy on the part of the Member States toward the actions of the Court, might explain the ability of the ECJ to make such great advances in integration. Third, the Court has actively sought to further integration in its judgements, which plays the additional role of functioning to increase the ECJ's legitimacy within Europe.

The task of this research project is to examine the bargaining and the outcomes that lead to European integration with respect to the Court and the Member States. Rational choice theory recognises that both national governments and the Court have self-interests that guide their behaviours. Realistically, the national governments and the European Union institutions are engaged in a struggle for the achievement of their respective goals. Consequently, the application of game theory seems to present a favourable

¹⁰⁷ See, for example, Brigitte Boyce, "The Democratic Deficit of the European Communities," *Parliamentary Affairs* 46, no. 4 (October 1993): 458-477.

means to examine integration since it is able to capture the essence of this bargaining. In such a game, the Member States and the Court represent the players while the process by which integration is either advanced or hampered represents the game. This study will argue that such an analysis seems to provide the emphasis on the roles of the states that is overlooked by functionalism, neofunctionalism and federalism.

To this purpose, this research will first concentrate on establishing the appropriate rational choice, game-theoretic model for evaluating the Court, the Member States and integration. Second, this model will be tested against Court cases, examined vis-à-vis the interactions between the Court and the Member States and evaluated in terms of the goals of both the Court and the Member States. Thus, the next chapter will focus on the development of a particular game as a model for evaluating the relationship between the Court and the Member States. Empirical testing will then evaluate the validity of this model and conclusions will be drawn on its appropriateness in evaluating the European Court of Justice and its role in European integration.

Chapter II

Towards a Rational Choice Analysis of the European Court of Justice

Despite a growing body of literature that characterises the Court of Justice of the European Communities as a chief actor in the process of European integration,¹ there is little agreement as to the manner in which the Court pursues such integration. This chapter will initially examine two theories of integration: neofunctionalism and neorationalism. After identifying their respective weaknesses, an alternative rational choice model, which will be termed the architect's compromise, will be derived. The architect's compromise model will then be tested on two landmark cases, *Cassis de Dijon*² and *Francovich v. Italy*³ to determine its suitability in explaining the role of the European Court of Justice. The chapter will then conclude that the architect's compromise model does provide a more rigorous explanation than previous models.

¹ A vast amount of the literature cited in this research project examines the Court's role in integration in some manner. Among others, the following works address integration and the Court exclusively: Maurice Lagrange, "The Court of Justice as a Factor in European Integration," *The American Journal of Comparative Law* 15 (1966-67): 709-725; Spyros Pappas, "The Court of Justice of the European Communities and European Integration," *Europäische Integration und Öffentliche Verwaltung*, ed. Reiner Buchegger (Vienna: Orac, 1992), 67-74; and Hjalte Rasmussen, "The Court of Justice of the European Communities and the Process of Integration," *Fédéralisme et Cours Suprêmes/Federalism and Supreme Courts*, ed. Edmond Orban et al. (Montreal: Les Presses de l'Université de Montréal, 1991), 199-237.

² Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, *European Court Reports* 1 (1979): 649-675; or *Common Market Law Reports* 3 (1979): 494-515.

³ Cases C-6/90 & C9/90, *Andrea Francovich and Another v. The Republic (Italy)*, *Common Market Law Reports* 2 (1993): 66-116; or *European Court Reports* (1991): I-5357-I-5418.

Survey of Theories

In her survey of the contending theories which examine the role of the European Court of Justice in European integration, Anne-Marie Slaughter terms one approach as “interactive” (or “contextual”) theory and subsequently defines its purpose as “to locate the activities of the European Court of Justice (ECJ) and the national courts in a broader political context.”⁴ Such an approach is particularly promising since it combines both law and politics, and hence is more reflective of reality. Viewing the European Court of Justice as “catalyst: of integration, of disintegration, [or] of equilibrium,” Slaughter recognises three “sub-strands” of such interactive theory: “traditional legal and political theory concerning the role of courts in conjunction with other political institutions,” neofunctionalist integration theory and rational choice analysis.⁵ While the first sub-strand consists of an impressive literature based on traditional political and legal theory and combines both prescription and analysis,⁶ it does not offer a

⁴ Anne-Marie Slaughter Burley, “New Directions in Legal Research on the European Community,” *Journal of Common Market Studies* 31, no. 3 (September 1993): 391.

⁵ *Ibid.*, 393-395.

⁶ *Ibid.*, 393. See, among others, M. Cappelletti, A. Secombe, and J. Weiler, eds., *Integration through Law: Europe and the American Federal Experience* (Berlin: de Gruyter, 1985); Joseph H. H. Weiler, “Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities,” *Washington Law Review* 61, no. 1 (January 1986): 1103-1142; J. H. H. Weiler, “The Transformation of Europe,” *Yale Law Journal* 100, no. 8 (June 1991): 2403-2483; Joseph Weiler, “The Community System: the Duel Character of Supranationalism,” *Yearbook of European Law* 1 (1981): 267-306; J. H. H. Weiler, “Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration,” *Journal of Common Market Studies* 31, no. 4 (December 1993): 417- 446; Joseph Weiler, “Community, Member States and European Integration: Is the Law Relevant?,” *Journal of Common Market Studies* 21 (1982): 39-56; Eric Stein, “On Divided-Power Systems: Adventures in Comparative Law,” *Legal Issues of European Integration* 1 (1983): 27-39; and Eric Stein, “Lawyers, Judges, and the Making of a Transnational Constitution,” *American Journal of International Law* 75 (January 1981): 1-27.

comprehensive model of integration despite its value in terms of description. Partly because of its concern with prescription, the first sub-strand often overlooks actual political events, relying instead on theoretic arguments which have not necessarily been validated. Thus, this present study instead focuses on the latter two explanations since these have formulated testable models which have been examined against actual events. Furthermore, the present research will argue that although neither neofunctionalism as applied to the Court by Mattli and Slaughter nor Garrett and Weingast's neorational model adequately explains the ECJ's role in the integration process, these models nevertheless capture important aspects of integration. The purpose of this research is thus to amalgamate the positive attributes of these competing models in the hope of providing the foundation of a theory of integration which explains both the role and the actions of the Court more precisely.

Neofunctionalism and Neorationalism

Given the sagacious attempts to better understand the Court, a recent debate has emerged between the proponents of neofunctionalism and rational choice as to the better alternative for explaining legal integration in the European Communities.⁷ Walter Mattli and Anne-Marie Slaughter have

⁷ Walter Mattli and Anne-Marie (Burley) Slaughter are the chief proponents of a neofunctionalist explanation of the ECJ's contribution to European integration (in addition to the article listed above, see Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration," *International Organization* 47, no. 1 [Winter 1993]: 41-76; and Walter Mattli and Anne-Marie Slaughter, "Law and Politics in the European Union: A Reply to Garrett," *International Organization* 49, no. 1 [Winter 1995]: 183- 190.), while Geoffrey Garrett and Barry Weingast have laid the foundation for a rational choice explanation (see Geoffrey Garrett and Barry Weingast,

ingeniously resurrected the once tarnished theory of neofunctionalism as a means of examining the role of the European Court of Justice in European integration. Drawing upon the ideas of Ernst B. Haas and other neofunctionalist pioneers, Mattli and Slaughter contend that while neofunctionalism might have been discredited as a means of explaining European integration at large, such a theory was never applied to the Court. They argue further that a closer study indicates that “neofunctionalism is in its element” in terms of explaining legal integration.⁸ Defining legal integration as “the gradual penetration of EC law into the domestic law of its member states,” Burley and Mattli cite both formal and substantive penetration of Community law into the laws of the Member States as evidence of neofunctionalism.⁹ Specifically, Burley and Mattli argue that formal penetration, both in the form of “supranational legal acts” and in the institution of European citizenship; and substantive penetration, in the form of economic spillovers into diverse social and political areas, reflect the Court’s “adoption of principles of interpretation that further the uniformity and comprehensiveness of the community legal system.”¹⁰ On the contrary, the current research project will argue that such encroachment of EC law simply does not occur as the national legal systems have vigorously guarded their own jurisdictions, as is clearly illustrated by the

“Ideas, Interests, and Institutions: Constructing the European Community’s Internal Market,” *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, eds. Judith Goldstein and Robert O. Keohane [Ithaca: Cornell University Press: 1993], 173-206; Geoffrey Garrett, “International Cooperation and Institutional Choice: The European Community’s Internal Market,” *International Organization* 46, no. 2, [Spring 1992]: 533-560; and Geoffrey Garrett, “The Politics of Legal Integration in the European Union,” *International Organization* 49, no. 1, [Winter 1995]: 171-181.)

⁸ Burley and Mattli, “Political Theory,” 51.

⁹ *Ibid.*, 43.

¹⁰ *Ibid.*

Bundesverfassungsgericht (German Federal Constitutional Court), which will be examined in Chapter VII.

According to Mattli and Slaughter, neofunctionalism correctly identifies the actors, their motives, their roles and the outcomes of their actions. In addition to the Member States and the Court, Mattli and Burley argue that a host of individuals and organisations above and below the states must all be examined in light of the European integration process. Hence, Mattli and Slaughter argue that integration cannot be understood without studying the personalities involved—including the various judges, academics and politicians—in the European project. (Conversely, this research project will argue that while this approach is useful as a descriptive device, it renders analysis difficult at best and quite possibly unmanageable.) Neofunctionalism identifies the self-interests of the actors as the motivation for integration.¹¹ Mattli and Burley further suggest that integration is attributed to functional spillover, or economic growth in one sector leading to growth in another; political spillover, or adaptation of political values and expectations as a result of sectoral integration; and the upgrading of the common interests which functions to stimulate compromise through international organisations (and thus increase the prestige of such organisations). Finally, neofunctionalism demands that these processes occur under the “mask” of “technical” or “uncontroversial” operations rather than as political developments.¹² Hence, a neofunctionalist would argue that integration occurs not because it moves in a series of notable and distinct steps. Instead, it

¹¹ Ibid., 53-54.

¹² Burley and Mattli, “Political Theory,” 55-56.

is a pattern of low profile alterations concealed by a perception that such decisions are purely technical in nature.

However, despite Mattli and Slaughter's thorough discussion, their advocacy of neofunctionalism nevertheless suffers from four main weaknesses. First, this study will prove that neofunctionalism underestimates both the power and the role of the Member States in the integration process and, instead, overestimates the impact of other actors. Second, this study will argue that neofunctionalism confuses the results of rational choices regarding integration with the concepts of functional and political spillovers. Third, the current research will further argue that Mattli and Slaughter's use of neofunctionalism suffers from one of the very weaknesses that largely discredited the theory in the 1970s: neofunctionalism implies that a particular institutional outcome is the result of integration. Fourth, this study will demonstrate that Mattli and Slaughter's assertion that the Court hides behind the mask of law in its thrust to integration,¹³ while a deceptively cogent explanation, exaggerates the perceived concealing quality of law and evades the fact that law is, in fact, essentially a political issue. These weaknesses underline the deficiencies of neofunctionalism: hence, a more appropriate model is warranted.

In contrast, Geoffrey Garrett and Barry Weingast reject the claims of neofunctionalism and present an impressive case for analysing integration through the lens of game theory.¹⁴ Challenging the notion that international co-

¹³ Ibid., 72-73.

¹⁴ See previously cited works by Garrett and Weingast.

operative arrangements inevitably reflect optimal settlements,¹⁵ Garrett instead argues that it is often difficult to identify perfect solutions among several countries and that asymmetric patterns of power may play a greater role in international co-operation than acknowledged by the traditional literature. In presenting his case, Garrett argues that “studies that concentrate solely on the shared interests of states and ignore the conflicts between them will be inadequate.”¹⁶

Garrett and Weingast’s game-theoretic analysis of European integration is characterised by “ideas, interests, and institutions.” To begin, Garrett and Weingast modify the traditional rational choice approach, recognising that games do not invariably offer a single optimal strategy and that institutions may play a large role in defining ambiguity. To this end, Garrett and Weingast point out that ideas may serve as “focal points” in stimulating the motivations of states to co-operate and argue that “some solutions are inherently more likely to emerge because the actors believe that others will choose them too.”¹⁷

¹⁵ Geoffrey Garrett refers to the body of literature on co-operation in general and notes particularly the following: Stephen D. Krasner, ed., *International Regimes* (Ithaca: Cornell University Press, 1983); Kenneth Oye, ed., *Cooperation Under Anarchy* (Princeton: Princeton University Press, 1986); Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984); David Kreps et al., “Rational Cooperation in the Finitely Repeated Prisoners’ Dilemma,” *Journal of Economic Theory* 27 (August 1982): 245-52; Michael Taylor, *The Possibility of Cooperation* (New York: Cambridge University Press, 1987); Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984); Paul Milgrom, Douglas North and Barry Weingast, “The Role of Institutions in the Revival of Trade: The Medieval Law Merchant, Private Judges, and the Champagne Fairs,” *Economics and Politics* 2 (March 1990): 1-23; Ronald Coase, “The Nature of the Firm,” *Economica* 4 (November 1937): 386-405; and Oliver Williamson, *The Economic Institutions of Capitalism* (New York: Free Press, 1985). Garrett, “International Cooperation,” 534.

¹⁶ *Ibid.*, 534-535.

¹⁷ Garrett and Weingast, 182.

Similarly, the Court functions as a mechanism for providing “solutions” to the problems not explicitly addressed by the Treaties. Furthermore, the authors suggest that, juxtaposed against their ideas for institutional solutions, the interests of Member States help determine the manner in which collective action is characterised either by the wishes of the stronger Member States (asymmetrical organisations of states) or by shared ideological focal points-- (more symmetrical organisations of states)--in Garrett’s example, completion of the internal market. Finally, authority is granted to institutions--in this case the ECJ--for whom the focal points of Member States’ self-interests and shared ideas suggest likely mechanisms for achieving collective goals.

As with Mattli and Slaughter, Garrett and Weingast’s model fails to offer a cogent, rigorous explanation for the role of the Court in European integration. Specifically, neorationalism as described above does not fully recognise the real power the Court has assumed in the integration process. In particular, Garrett and Weingast’s analysis appears to relegate the Court to being merely a tool of the Member States, whose only strategic goal is to retain its legitimacy through careful consideration of the possible repercussions a case might have before handing down a decision. As the present analysis will prove, this falls short of recognising the fact that the Court has been a relatively autonomous body using its mandate to create a more integrated Europe through establishing such fundamental principles as direct effect and supremacy.

Thus, while neofunctionalism and neorationalism offer fruitful points of departure for the development of a more coherent theory of integration, this

research will argue that neither offers a decisive account of the role of the Court in European integration vis-à-vis the Member States. Following a more thorough critique of both Mattli and Slaughter's neofunctionalist model and Garrett and Weingast's neorationalist hypothesis, an alternative model will be presented in an attempt to explain the process of European integration in regard to the interactions of the European Court of Justice and the Member States. In particular, such a detailed discussion of the respective shortcomings of neofunctionalism and Garrett and Weingast's brand of neorationalism should reveal the necessity for an alternative model. With this in mind, this analysis now turns to an examination of the deficiencies of neofunctionalism.

Neofunctionalist Deficiencies

Although Mattli and Slaughter are correct in arguing that numerous personalities at the sub- and supra-state level exert an influence on integration, these individuals and organisations only exert pressure on the preferences of Member States and the Court; they do not have the power to make the actual decisions that lead to either integration or disintegration. Mattli and Slaughter state "just as neofunctionalism predicts, the drivers of this process are supranational and subnational actors pursuing their own self-interests within a politically insulated sphere."¹⁸ According to such logic, one is led to believe that lawyers and judges are able to increase the prestige of their profession through pushing integration with no significant resistance. On the contrary, the

¹⁸ Burley and Mattli, "Political Theory," 43.

Member States have functioned as the agents of integration through drafting the Treaties, bargaining within the Council by their respective ministers and making decision regarding integration in the Inter-Governmental Conferences. The case of *Francovich v. Italy*,¹⁹ which will be subsequently discussed in greater detail, illustrates the argument that the Court acts to bring about the European Communities *according to the aims of the Member States as expressed in the Treaties*. Basing its decision on Articles 5 and 189 (EEC), the Court found in *Francovich v. Italy* that Member States were liable in the failure of enacting directives and must compensate individuals for any adverse results of this failure. In short, the Court's decision can be interpreted as "filling in the gaps" (of the Treaties) necessary to the efficient functioning of the Communities. Thus, as the Member States committed themselves to the goals enumerated in the separate Treaties, they have de facto committed themselves to the measures necessary for the maintenance of such a common market. Regardless of the facts that individuals may bring cases before the Court, lawyers argue the cases and judges make the decisions, the Member States have already designated certain authority to the Court; its decisions merely fill in the gaps. Thus, the true process of integration is initiated by the Member States--for example, through drafting the Treaties, participating in the Inter-Governmental Conferences, appointing Commissioners, working in the Council: the Court can merely *interpret* what has already been written into law by the Member States.

¹⁹ See *Francovich v. Italy*.

The second criticism of Mattli and Slaughter's argument focuses on their assertion that functional and political spillovers lie at the foundation of the process of integration. Mattli and Slaughter assert that functional spillovers account for the considerable expansion of European law from "dominantly economic" areas into diverse social issues including "health and safety at work, entitlements to social welfare benefits, mutual recognition of educational and professional qualifications, and . . . political participation rights."²⁰ While the argument for spillovers at first glance appears to offer a comprehensive explanation of integration, a closer study of the Court reveals that integration is not adequately explained by spillover logic. Although the term "spillover" can be used as a descriptive term for expansion, such a use does little to provide an explanation of the processes that lead to decisions by the Court regarding integration. According to Mattli and Slaughter, spillovers occur when "the jurisdiction of the authorities charged with implementing. . . [an agreed]. . . objective will expand as necessary to address whatever obstacles that stand in the way."²¹ On the contrary, "the ECJ cannot initiate; it can only rule on the cases brought before it, which explains the haphazard ways in which fundamentals have so far been elucidated."²² In their examination of *Schlieker v. High Authority of the ECSC* (1963), D. Lasok and K. P. E. Lasok point out that "the Court is the creature of the Community Treaties and so its jurisdiction derives exclusively from those Treaties. . . . [I]n interpreting the Treaties the Court is bound to adhere strictly to the provisions of the text, and. . . it has no

²⁰ Burley and Mattli, "Political Theory," 66.

²¹ Ibid., 65.

power other than that conferred by the Treaty.”²³ Thus, there is a clear contradiction between Mattli and Slaughter’s and Lasok and Lasok’s interpretation of *jurisdiction*. Specifically, Mattli and Slaughter appear to attribute power to the Court to unilaterally extend its jurisdiction; however, as has been illustrated, the Court’s jurisdiction is defined by the Treaties and can only be altered by the Member States themselves. The present research argues instead that the process of integration is a product of the bargaining between *both the Member States and the Court*.

Moreover, such an assertion that Community law is organic in nature is simply not reflected in reality. Although employing a teleological approach to decision-making allows the Court to formulate judgements which strengthen the integrity of European law, the German reaction to the Maastricht Treaty,²⁴ for example, unambiguously proves that the Court of Justice *cannot* extend its jurisdiction. To explain, the German Federal Constitutional Court (the *Bundesverfassungsgericht*) held that *Kompetenz-Kompetenz*,²⁵ or the authority for determining authority, rests with the Member States. Hence, the ECJ is

²² Keith Middlemas, *Orchestrating Europe: The Informal Politics of the European Union 1973-95* (London: Fontana Press, 1995), 369.

²³ D. Lasok and K. P. E. Lasok, *Law and Institutions of the European Union*, 6th ed. (London: Butterworths, 1994), 251. According to Lasok and Lasok, in *Schlieker v. High Authority of the ECSC*, the plaintiff maintained that she had sustained a loss due to the inactivity of the High Authority and argued, “upon analogy with German municipal law,” the Court had a “residual jurisdiction to enable it to protect the interests of individuals where the Treaty texts are silent”; however, the Advocate General stated that “the Court can define the limits of its supra-national legal protection only by using the text of the Treaty and not by following national law.” See Case 12/63, *Marga Schlieker v. High Authority of the European Coal and Steel Community*, *Common Market Law Reports* (1963): 281-288.

²⁴ Cases 2 BvR 2134/92 & 2159/92, *Manfred Brunner and Others v. The European Union Treaty*, *Common Market Law Reports* 1 (1994): 57-108.

²⁵ The issue of *Kompetenz-Kompetenz* and the ECJ is fundamental to this research and will be addressed throughout the project, most notably in Chapters III and VII.

practically and legally incapable of expanding its own jurisdiction. Moreover, such *ultra vires* acts (actions which are outside the jurisdiction of a particular entity) that neofunctionalism labels “spillovers” have also been prohibited by the German Federal Court. Juliane Kokott summarises the position of the German court:

... problems arise when European organs, including the ECJ, overstep the competences attributed to them by the founding Treaties. The democratically elected German parliament consented to Community Acts covered by the Treaties; *ultra vires* Acts not covered by the will of the German Parliament violate the principle of democracy. The Federal Constitutional Court as the guarantor of basic rights takes over the role of defending the people against undemocratic *ultra vires* Acts of the Communities. These are now directly subject to review by the Federal Constitutional Court.²⁶

Given these political and legal realities, it is difficult indeed to argue that European law grows organically from previous acts of the Court. Instead, this research project argues that European law can only develop within the parameters set by the Member States in the Treaties.

A third criticism of neofunctionalism concerns its assumption that a particular institutional outcome is the result of integration. In the very work which declared the “obsolescence” of regional integration theories, Haas argues that the assumption that regional integration will result in a particular institutional outcome runs counter to reality in the case of Western Europe. Haas argues that unless neofunctionalism can accommodate the emergence of “various end states,” then it becomes irrelevant, and instead, “regional

²⁶ Juliane Kokott, “German Constitutional Jurisprudence and European Integration II,” *European Public Law* 2, no. 3 (1996): 434.

integration processes will result in the creation of independence patterns with extra-regional forces and actors.”²⁷ Interestingly, Mattli and Slaughter quote Haas’s earlier (pro-integration theory) writings to provide a definition of neofunctionalism which clearly suggest that the final product of regional integration is “a new and larger center, whose institutions possess or demand jurisdiction over the pre-existing national states.”²⁸ Mattli and Slaughter’s brand of neofunctionalism thus suffers from the inadequacies of the theory’s oversights a priori, something which is further exacerbated by both their adoption of such a deterministic definition and their failure to even mention, much less rectify, neofunctionalism’s inability to accommodate various institutional outcomes. Mattli and Slaughter’s model is especially vulnerable to this oversight as they criticise other theories on their lack of “microfoundations.”²⁹ However, without adhering to the microfoundations of neofunctionalism, Mattli and Slaughter’s model must necessarily be considered less than theoretically sound.

Fourth, Mattli and Slaughter attribute a greater influence to the use of law as a mask or a shield than is reasonable. Contrary to Mattli and Slaughter’s assertion, law *is* a political issue. Perhaps the Court has benefited from relative obscurity, “tucked away in the fairyland Duchy of Luxembourg, and blessed

²⁷ Ernst B. Haas, “Turbulent Fields and the Theory of Regional Integration,” *International Organization* 30, no. 2 (1976): 177-178.

²⁸ Burley and Mattli, “Political Theory,” 53, quoted from Ernst B. Haas, “The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing,” *International Organization* 24 (Autumn 1970): 610.

²⁹ Burley and Mattli, “Political Theory,” 42.

until recently, with benign neglect by the powers that be and the mass media”;³⁰ however, its decisions *do* affect the Member States in a *political* manner, and by asserting that the Court has a *carte blanche* to march toward integration as long as it wears the mask of law is simplistic at the very least. Moreover, it is also short-sighted to assume the Court can hide behind the shield of law. That the Member States have yet to mount a concerted attack on the powers of the Court offers precious little evidence that the shield of law provides refuge from the attacks of Member States. Although unsuccessful, the vote by Eurosceptic MPs in the British House of Commons in April 1996 to curb the powers of the ECJ in the wake of the BSE crisis³¹ is but one recent example of the *political* backlash that “the shield of law” could not deflect.

Neorationalist Shortcomings

In contrast to the great importance given to the Court by Slaughter and Mattli, Garrett and Weingast seem to underestimate its powers. While Garrett has recognised that the “Court of Justice is. . . a strategic actor that takes into account the anticipated responses of national governments before it decides cases brought before it,”³² such an interpretation of the Court falls short of appreciating its actions in reality. Renaud Dehousse and Joseph Weiler point out that “the Court of Justice has been called on to develop a constructive interpretation of basic principles contained in the EEC Treaty. . . in order to fill

³⁰ Stein, “Transnational Constitution,” 1.

³¹ See Philip Webster, “66 Tories vote to cut power of EU Court,” *The Times* (Wednesday, 24 April 1996): 1.

³² Garrett, “Politics,” 180.

lacunae caused by the inaction of Community legislative organs [which has]. . . opened many avenues which are not expressly envisaged by the drafters of the Treaties.”³³ As a self-interested actor within the integration process, the Court “has a vested interest in political centralization, and there is little doubt that it has acted as an ‘engine’ of political and market integration.”³⁴ In contrast, Garrett and Weingast attempt to relegate the Court to very much a secondary actor in the integration process, one whose *raison d’être* is but to serve the wishes of the (usually most powerful) Member States. However, as has been (and will further be) argued, such a pessimistic view of the Court is simply not indicative of reality.

Nevertheless, despite Garrett and Weingast’s disregard for the Court’s real power as a player in the integration process, their idea of the Court as an agent for the resolution of the incomplete contracting problems left by the Treaties offers great promise for illustrating a general explanation of the Court’s authority and responsibilities. To explain, Garrett and Weingast suggest that the Court functions to “fill in the gaps” which the Member States inevitably left in the framework of the Communities in the Treaties. Furthermore, it should be recognised that Garrett’s concept of the incomplete contracting problems present in the Treaties which must be addressed by Court action actually accommodates Mattli and Slaughter’s argument that the Court is a major actor in the integration process although *within* the confines of what the Member

³³ Renaud Dehousse and Joseph H. H. Weiler, “The legal dimension,” *The Dynamics of European Integration*, ed. William Wallace (London: Pinter Publishers, 1990), 246-247.

³⁴ Roland Vaubel, “The Public Choice Analysis of European Integration: A survey,” *European Journal of Political Economy* 10 (1994): 237.

States have already agreed upon. To explain, Garrett asserts that the Court functions as an agent for “mitigating the incomplete contracting problems” of the Union. Garrett further argues:

It is always extremely costly, if not impossible for actors to make exhaustive agreements that anticipate every dispute that may arise between them. Rather than attempting to do this, parties inevitably make agreements that only sketch the broad ‘rules of the game’ and then delegate the authority to apply and adapt these rules to specific cases.³⁵

The Treaties are then subjected to clarification, at which time the Court becomes a means of integration *but only in terms of its authority to clarify the prior agreements by the Member States*.

As is noted above, the Court is restrained *within* the boundaries established by the Treaties (which, as earlier explained, is incompatible with the idea of spillovers and better explained by incomplete contracting logic). Thus, the Court must remain cognisant of the fact that it was created by the Member States and owes its legitimacy to just interpretation of the Treaties. Alter and Meunier-Aitsahalia explain that “the Court is a political actor, responding to the political environment as do all political actors, but nonetheless able to act autonomously from the member states.”³⁶ Garrett and Weingast’s notion of the Court following the will of the largest Member States thus appears flawed since the Court has clearly expressed judgements contrary to the wishes of the largest

³⁵ Garrett, “International Cooperation,” 557. In referring to the “rules of the game,” Garrett cites David M. Kreps, “Corporate Culture and Economic Theory,” *Perspective on Positive Political Theory*, eds. James E. Alt and Kenneth A. Shepsle (Cambridge: Cambridge University Press, 1990), 90-143.

³⁶ Karen J. Alter and Sophie Meunier-Aitsahalia, “Judicial Politics in the European Community: European Integration and the Pathbreaking *Cassis de Dijon* Decision,” *Comparative Political Studies* 26, no. 4 (January 1994): 556.

states and has taken an “activist”³⁷ role in integration *within* the confines of its responsibility to clarify the Treaties. Burley and Mattli criticise Garrett and Weingast on the neorationalist assumption that “states will only comply with judicial decisions if in fact those decisions are in their interests,” and assert that instead, “What we know is that at the time a particular case is brought, different governments strongly disagree as to its outcome. Over time, however, they tend to accept the Court’s position and regard the path chosen as inevitable. *It is precisely this process that needs to be explained.*”³⁸ To reiterate, as this study suggests that neither Mattli and Slaughter nor Garrett and Weingast have adequately explained this problem, an alternative explanation could rectify these inconsistencies.

Towards a New Rational Choice Model

Although Garrett and Weingast’s rational choice explanation suffers from the flaws discussed above, there is still merit in analysing the Court through a game theoretic approach since such an approach is able to capture the bargaining situation which lies at the heart of the relationship between the ECJ and the Member States. Such a model to examine the contribution of the European Court of Justice to the integration process must focus on the relationship between the Member States and the European Union since the

³⁷ Mary L. Volcansek (“The European Court of Justice: Supranational Policy-Making” in *Judicial Politics and Policy-Making in Western Europe*, ed. Mary L. Volcansek [London: Frank Cass, 1992], 109-121.) and Stein (“Transnational Constitution,” 1-27) are but two of the authors who characterise the European Court of Justice as an “activist” court.

³⁸ Burley and Mattli, “Political Theory,” 51.

arguments made above seem to suggest that this theatre is fundamental to the understanding of European integration. Precisely, it appears to be the manner in which the Member States accept Court decisions and the role that the Court plays in the integration process that should be at the heart of a theory of legal integration. A recent attempt to examine the European Court of Justice through the lens of game theory has been undertaken by Robert Cooter and Josef Drexl; however, the research focuses on the overall balance of power *among* the institutions rather than between the Court and the Member States, as is the focus of this study.³⁹ Hence, it, too, sheds little understanding on the Court's role in the integration process. Noting the shortcomings of previous attempts to analyse the Court through game theory, we move now to develop a new model which will more accurately capture the essence of the Court's role in European integration.

The Architect's Compromise Model

Based on the foregoing conclusions of this research project, any model that attempts to address the role of the European Court in European integration must appreciate the position of the Member States; hence, such a model must be founded upon the bargaining between the Member States and the Court which has characterised the process of European integration. While the specific

³⁹ See Robert Cooter and Josef Drexl, "The Logic of Power in the Emerging European Constitution: Game Theory and the Division of Powers," *International Review of Law and Economics* 14 (1994): 307-326. In its assumptions on the Court, the authors state that "an independent court can make law or change it by interpretation." Such an assumption appears to be in contradiction to the actual authority granted to the Court by the Treaties, which has been explained above by Lasok.

assumptions regarding such interaction between the Court and the Member States will be outlined subsequently, it is initially advantageous to examine the overall dynamics of their relationship. A useful illustration to explain the Court's role in integration in relation to the Member States could involve similar elements to those that are implicit in the relationship between an architect and his or her client. In such a model, the client commissions the architect to design and build a particular structure. In an economic sense, both the client and the architect wish to maximise their respective utilities in the completion of the project. Accordingly, the client maximises his or her utility by the construction of a building that most closely conforms to its intended purpose, to any price restraints, to the proposed function and to the image sought by the client. For example, if the client wishes to build an art gallery, he or she would scarcely be interested in designs for an amusement park. Similarly, the architect wishes to maximise his or her utility. Naturally, the architect often receives great satisfaction in achieving many of the client's goals; however, other concerns such as the aesthetic value of the building and the freedom for artistic expression could represent a significant element of the architect's utility. Therefore, some conflict will exist between the separate goals of the architect and the client to the extent that their respective utilities are unique.

Given the fact that the client actually commissions the architect to construct a particular structure, the architect must ultimately compromise his or her self-interests or risk being sacked when preferences are noticeably dissimilar. While the ultimate design is a product of the client's initial requests tempered by the architect's preferences, the architect maintains a formidable

influence upon the design of the structure. Furthermore, the architect is able to take relatively great liberties in developing an aesthetically pleasing structure *but only as long as the ultimate product appears it will conform to the client's requirements even when minor or temporal developments might seem to conflict with the client's preferences.* The final product may thus best be described as the intersection of the client and the architect's preferences and ideas, reached through a process of the declaration of wishes of the client followed by the interpretation and subsequent implementation of these wishes by the architect, who often enjoys great liberty in execution.

Likewise, the relationship between the European Court of Justice and the Member States appears similar to that of an architect and a client. As has been previously discussed, although the European Union is an association of sovereign states, the Court of Justice--as a rational agent, engaged in purposeful actions--is assumed by this research to seek to increase its influence through further integration. However, it ultimately owes its legitimacy to the favour of the Member States⁴⁰ and must in this respect reflect the same concerns as those evident in an architect's compromise: the Court is bound by its "contract," the Treaties, to restrain its actions within these parameters set by its clients, the Member States. In such a manner, both the Court and the Member States are

⁴⁰ According to Keith Middlemas, "The Court. . . has margins of interpretation which inhibit it from direct confrontation with member states--as when it found the Irish government liable neither to fund the provision of information about abortion nor to change its legislation, but nevertheless ruled that it could not impose restrictions on an individual's right to travel, and to have access to information about clinics outside the Republic where an abortion might be performed (Crotty Case). . . . Its inner standard is to pursue the largest possible measure of consensus in the judgements, even if only a bare majority suffices." (Middlemas, 377)

engaged in a bargaining process in which they must co-operate with one another in order to advance European integration. Nevertheless, this thesis will argue that the Court enjoys significant freedom in interpreting the Treaties and, as a result, has assumed impressive authority in the move towards further integration.⁴¹

Assumptions of the Architect's Compromise Model

This research recognises five assumptions which are fundamental to the explanation of the Court's role as architect in an architect's compromise model of European integration. First, the actors are defined as the Court (the architect) and the Member States (the client). Second, actors are assumed to be rational insofar as they make decisions according to the information (although often imperfect) that appears to maximise their future returns. Third, the Court is a strategic actor whose goal is the success of the European Communities and thus generally prefers to act in favour of further integration. To refer back to the architect-client analogy, the architect wishes the structure to be constructed; therefore, he or she prefers to act in a manner which will bring the designs to fruition. Fourth, the state of nature which surrounds the decision-making atmosphere of the Court is characterised by what will be termed *modified preferences*. As this concept will be discussed in due course, for the moment, we will recognise simply that modified preferences imply that the preferences of

⁴¹ For a basic discussion on the Court's authority, see Weiler, "Community, Member States and European Integration."

Member States are often tempered by competing ambitions. Fifth, the Member States, while possessing the right and ability to ignore or rebel against the Court, generally follow the decisions of the Court as they must conform to the Treaties, with the ultimate interests of integration, and with Members' modified preferences. The following discussion will elaborate on these assumptions.

First, while lawyers, lobbyists, judges, academics, politicians, international organisations, corporations and a host of other individuals and groups certainly influence the nature of integration, the model focuses on the Member States and the Court as these are the actors who actually make the decisions that determine European integration. According to Mary L. Volcansek, "the Community, though not really a federation, functions largely through its member states."⁴² As has been previously argued, while states do transfer an element of their sovereignty by choosing to join the Union, they avoid ceding "open-ended authority" to supra-national institutions including the Parliament and Commission. Rather, Member States are more prone to decide the sensitive issues dealing with sovereignty in the inter-governmental Council.⁴³ Engaged in an often virtual tug-of-war, the Member States and the Court both seek their respective self-interests, reflecting a similar relationship to that of the architect and the client. Likewise, as the Member States themselves established the Communities, they must adhere to the provisions or risk losing the privileges of membership as a result of cheating. We further identify the national courts as

⁴² Volcansek, 110.

⁴³ Andrew Moravcsik, "Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community," *International Organization* 45, no. 3 (Summer 1991): 26-27.

an important element of the Member States. The national courts' influence is particularly important in that they have the power to appeal for preliminary rulings, and depending on their reception of Community law, integration can either be enhanced or stymied. For the sake of simplicity, however, the model assumes the national courts to be a component of the Member States and not separate actors in their own right. Moreover, a model which attempts to incorporate each of the separate, unique national court systems of the Member States faces the danger of being too complex and merely descriptive. Hence, the national judiciaries will be thought of as a component of the separate Member States. The other main actor, the European Court of Justice is identified because of its influence on determining the meaning of the Treaties. It is almost axiomatic to state that the Court has truly functioned as one of the most successful factors affecting European integration. However, although the Court may be thought of as the organ which interprets the specific problems that arise with the process of integration, the ECJ must nonetheless operate within the boundaries set by the Treaties or risk losing its legitimacy in the eyes of the Member States.

Second, the Member States and the Court are considered rational actors. Recognising the lack of consensus surrounding the connotations of the term *rational*, the model uses Peter C. Ordeshook's broad, neutral definition which equates rationalism to purposeful activity. Accordingly, Ordeshook remarks:

Purposeful does not necessarily mean that people carefully and consciously list their alternative actions, map all the relevant or possible consequences of each act, estimate the probability of each consequence, and define precisely their preferences across all consequences. Thus, we cannot ignore habit, instinct, and the use of simple cues and heuristics to

uncomplicate complex decisions. . . The assumption of purposeful choice implies simply that, after taking account of people's perceptions, values, and beliefs, we can model their decisions by asserting that they act *as if* they make such calculations.⁴⁴

Applying this definition to the model, this research will demonstrate that the Court rationally seeks to pursue the action that maximises its expected utility in light of the knowledge that Member States have made rational decisions in the Treaties establishing the Communities, through the Council and in their reactions to Court decisions.

Third, the Court is a strategic actor finding its *raison d'être* in enhancing the effectiveness of the European Communities. To begin, André Bzdera argues that the Court with its "centralist inclination" has advanced a federal legal system over traditional international law.⁴⁵ Rasmussen speaks of an "activist court"⁴⁶ while Stein maintains that the ECJ "has fashioned a constitutional framework for a federal-type structure in Europe" which has resulted in "the supremacy of Community law within its limited but expanding area of competence over any conflicting national law."⁴⁷ These phenomena appear to be directly related to the strategic decisions made by the Court which reflect the predictions of rational choice theory.

⁴⁴ Peter C. Ordeshook, *Game Theory and Political Theory* (Cambridge: Cambridge University Press, 1986), 2.

⁴⁵ André Bzdera, "The Court of Justice of the European Community and the Politics of Institutional Reform," *Judicial Politics and Policy-Making in Western Europe*, ed. Mary L. Volcansek (London: Frank Cass, 1992), 124.

⁴⁶ See Hjalte Rasmussen, "Between Self-Restraint and Activism: A Judicial Policy for the European Court," *European Law Review* 13 (1988), 28-38.

⁴⁷ Stein, "Transnational Constitution," 1.

Fourth, the current research suggests that the nature of further integration appears to be the product of the dichotomy between the limits set by the Treaties and what will be called the *modified preferences* of the Member States. The term modified preferences will be used to represent the interests of the States as a function of their responsibilities as Members of the Community. Reality runs counter to Garrett's assertion that "it seems that the principles governing decisions of the European court. . . are consistent with the preferences of France and Germany,"⁴⁸ which he later attempts to justify by suggesting that the Court's ruling *against* Germany in the *Cassis de Dijon* decision was actually in Germany's "rational self-interest" since it both allowed the German government to *appear* to argue for domestic industry *and* to subsequently *appear* to be a "good European" by accepting the adverse decision against it.⁴⁹ However, Slaughter and Mattli recognise a flaw in Garrett's explanation by stating: "We argue that at each major step of the construction of that system, the court was able systematically to override member states' true preferences as perceived by individual states at the time and was able to impose constraints on the ability of those states to fight back."⁵⁰ Perhaps Mattli and Slaughter err in attributing too much power to the Court; however, they correctly make the point that the decisions of the Court are not always in line with the *true preferences* of the Member States. Instead, employing a teleological approach, the Court will attempt to interpret the Treaties to fit its own self-interests (further prestige for the EU, generally through increased

⁴⁸ Garrett, "International Cooperation," 558.

⁴⁹ Garrett, "Politics," 175-176.

⁵⁰ Mattli and Slaughter, "Law and Politics," 184.

integration). As the Treaties provide the Court with its framework for decision-making and since they have been constructed by the will of the Member States, they embody the preferences of the States and work to provide the Court with legitimacy as long as its decisions are within the bounds of the Treaties. However, these modified preferences are not reflective of the sheer self-interests of the Member States, lest they would argue for more than the Communities could provide. Instead, these preferences are modified by the Member States' realisation that they must sacrifice certain selfish interests such as complete sovereignty to gain access to the largest free market in the world.

Fifth, in their reactions to the decisions of the Court, the Member States generally co-operate with the decisions of the Court as it is usually in their ultimate interests to show such co-operation as to achieve the aims of the Treaties, even if a particular decision by the Court is cause for a temporary setback. (Moreover, repeated offences by a Member State would have negative repercussions on its reputation for compliance.) Conceding the flaws of their neorationalist model, this research nonetheless recognises that Garrett and Weingast correctly illustrate this point in relation to the development of the internal market of the Communities. Since the Member States all benefit from the internal market and since it is recognised that the Court functions to settle problems that arise, the Member States--even when temporarily injured--tend to abide by Court decisions. According to Garrett and Weingast, "So long as EC members value effective participation in the internal market more highly than they do the benefits of defecting from rules that affect them adversely, it is unlikely that governments will jeopardize their positions through flagrant

violations of commonly agreed rules.”⁵¹ Neill Nugent argues that while “the particular balance of advantages and disadvantages varies from state to state, . . . each judges that there is more to be gained from being in the EU than being out.”⁵² However, it must be acknowledged that Member States may rationally choose to ignore the decisions of Luxembourg. This is due not to the least that, as André Bzdera suggests, “the Court possesses. . . only a very limited institutional capacity to ensure that its decisions are implemented by recalcitrant member states.”⁵³ However, non-compliance by Member States could significantly undermine the integrity of the Communities and hence, the benefits it provides. Therefore, it is generally in the interests of the Member States to comply with ECJ decisions.

Explanation of the Architect’s Compromise Model

Based upon these assumptions, a particular rational choice model will now be derived to examine the actions of the European Court of Justice vis-à-vis the Member States. Specifically, the decisions of the Court can be explained as being reflective of the maximum expected utility the Court predicts in light of its anticipated preferences of the Member States and according to its desired consequence. Such an equation will be adopted because it provides a

⁵¹ Garrett and Weingast, 198.

⁵² Neill Nugent, William E. Paterson, and Vincent Wright, eds., *The Government and Politics of the European Union* (London: Macmillan, 1994), 411.

⁵³ Bzdera, 123. See also Stephen Weatherill and Paul Beaumont, *EC Law*, 2nd ed. (London: Penguin Books, 1995), 174-182.

perceptible gauge of the Court's preferences in issues regarding integration. To such an end, we will consider the following utility function:⁵⁴

$$AEU(a) = \sum_{\text{all } m} p(m)u[o(m,a)],$$

where: $AEU(a)$ ⁵⁵ represents the expected utility the Court derives through pursuing action a ;

$p(m)$ ⁵⁶ indicates the probability that a particular state of nature (m), or in this case a particular modified preference by the Member States will prevail; and

$u[o(m,a)]$ denotes the utility that would be derived if outcome o (a function of state of nature m and action a) is achieved.

Furthermore, all of the possible actions, or in this case decisions, available to the Court comprise the set A , which is composed of all the mutually exclusive and exhaustive possible actions available to the Court. In other words, all the possible actions are contained in the set A , and one and only one must be chosen. Specifically, $A = \{a_1, a_2, a_3\}$, and a_1 denotes a Court decision in favour of deeper integration; a_2 represents a Court decision neither in favour of deeper integration nor in favour of disintegration; and a_3 indicates a Court decision in favour of disintegration. Similarly, M is the set of all possible states of nature (or in this case, the attitudes of the Member States) that characterise the political, economic and social climate in which Court decisions are made. Thus, M comprises the mutually exclusive and exhaustive set M , where $M = \{m_1, m_2,$

⁵⁴ The utility function upon which the model is based is an adaptation of the Von Neumann-Morgenstern utility function presented in James D. Morrow, *Game Theory for Political Scientists* (Princeton: Princeton University Press, 1994), 23.

⁵⁵ $AEU(a)$ denotes "Architect's Expected Utility of action a ."

⁵⁶ $p(m)$ denotes "probability of modified preference."

m_3 }. In the set M , m_1 indicates a condition in which the modified preferences of the Member States reflect pro-integration sentiments; m_2 denotes a condition in which the modified preferences of the Member States are ambivalent to integration; and m_3 represents a condition in which the modified preferences of the Member States reflect anti-integration sentiments.

By using such an equation, the expected actions of the Court are functions of the expected utility (prestige earned, integration achieved or power attained) from certain outcomes and the probability of the Member States holding particular preferences. Such specific formulations have been adopted since they are able to capture the strategic nature of Court decisions and the modified preferences which characterise the attitudes of the Member States to further integration. As a result of this model, a number of consequences could be expected depending on the prevailing state of nature and the pursued action. The following table maps the possible consequences resulting from a selected action and the existence of a particular state of nature:

States of Nature (Modified Preferences)

		m ₁	m ₂	m ₃
actions	a ₁	O ₁	O ₄	O ₇
	a ₂	O ₂	O ₅	O ₈
	a ₃	O ₃	O ₆	O ₉

The elements of set O denote all possible consequences of Court decisions taken under differing states of nature, where $O = \{O_1, O_2, O_3, O_4, O_5, O_6, O_7, O_8, O_9\}$ and the following table lists all the elements of O:

- O₁ Member States accept the Court decision, integration deepens
- O₂ Member States accept decision
- O₃ Member States may either reject Court decision outright or alter the Court through Treaty revision
- O₄ Member States accept Court decision but could limit the authority of the Court in the future
- O₅ Member States accept decision
- O₆ Member States may accept Court decision but may alter the authority of the Court in the future
- O₇ Court decision rejected if not consistent with modified preferences, rejection in the form of cheating and/or

- altering the authority of the Court
- o₈ Court decision accepted
- o₉ Court decision accepted

Thus, in these simple game-theoretic terms, the Court determines its desired outcome and pursues such actions according to its understanding of the state of nature (modified preferences) to bring about its desired consequence. Having developed a theory based upon rational choice assumptions, it will now be tested against two notable cases: *Cassis de Dijon* and *Francovich and Bonifaci v. Italy*. Through such testing, the ability of the model to explain the manner in which European integration is achieved by the Court will be evaluated.

Cassis de Dijon

Given that the pivotal *Cassis de Dijon* case of 1979 is the most thoroughly discussed case in the debate between Garrett and Mattli and Slaughter, it seems only natural that it should serve as the first case study of this research. Before examining the case by means of the architect's compromise model previously developed, a brief overview of *Cassis* will outline the details of this well-known case. Following the overview, a critique of the models of both Garrett and Mattli and Slaughter will be developed. Finally, the case will be examined through the architect's compromise approach.

A Brief Overview of *Cassis de Dijon*

In the events leading up to the case, the German corporation Rewe Zentral AG sought to import the French blackcurrant liqueur Crème de Cassis de Dijon and thus applied for permission from the *Bundesmonopolverwaltung für Branntwein* (German Federal Spirits Monopoly) in September 1976. In response to this request, the Federal Spirits Monopoly stated that such authorisation was no longer required (due to a general authorisation of importation granted on 8 April of the same year); however, the Federal Monopoly advised Rewe that Cassis could not be marketed in Germany. Specifically, German law permitted only those spirits with an alcohol content of 32% or greater (with some exceptions, notably a reduction to 25% for liqueurs similar to Cassis, which came as a result of a similar case involving the liqueur Ainsette) to be marketed in the Federal Republic. The Federal Monopoly maintained that since Cassis has an alcohol content of 15 to 20%, the importation and sale of the liqueur could not be authorised.⁵⁷

In contesting the advice of the Federal Monopoly, Rewe brought the issue before the *Hessische Finanzgericht*, a German national court. Consequently, the *Hessische Finanzgericht* requested a preliminary ruling from the European Court of Justice on 28 April 1978. As Article 30 had been interpreted to prohibit any measure enacted by a Member State that directly or indirectly creates an obstacle to trade, the German Monopoly argued the case

⁵⁷ See *Cassis de Dijon* and Alter and Meunier-Aitsahalia, 535-561.

on health grounds. Despite the German assertions that a reduction of the alcohol content could contribute to health problems arising from consumer confusion and that the German law discriminated equally among domestic and foreign producers, the Court ruled against the German position. The Court found that the German law was in conflict with the free movement of goods. This decision thereby established the principle of mutual recognition, which has subsequently been so important.⁵⁸ Before turning to an examination of the *Cassis* decision in terms of the model developed earlier in this chapter, the ideas of Garrett and Mattli and Slaughter will be critiqued in light of this case to once again illustrate the weaknesses of these respective models and thus demonstrate the necessity for the means of analysis employed in this current study.

Critique of Garrett and Mattli and Slaughter

In his analysis of the case, Geoffrey Garrett focuses on attempting to prove that the actors demonstrated rational behaviour. Arguing that the German government had no great economic stimulus to fight the case to victory, given that “the impact on powerful wine and beer producers would have been minimal,”⁵⁹ Garrett instead identifies Germany’s necessity to appear “prepared to fight for the protection of German industry.”⁶⁰ In addition, it should be noted that Garrett believes that Germany had two additional reasons for fighting the Court decision: first, to avoid the political repercussions by

⁵⁸ Alter and Meunier-Aitsahalia, 537-539.

⁵⁹ Garret, Politics, 175.

⁶⁰ Ibid., 175- 176.

angry domestic producers at losing part of the market; and second, in the event that the Court ruled *against* Germany, to act as a “good European” by then following the decision of the Court. Thus, the actions of Germany can be thought of as a win-win situation, both domestically and internationally. Finally, Garrett concludes that, after fiercely fighting against Rewe, the German government rather happily acquiesced to the decision of the Court since it actually made a great stride in the direction of German interests--namely, increased trade liberalisation amongst the Member States.⁶¹

Arguing that the *Cassis* decision *actually* reflects German preferences, Garrett maintains that the players conformed to the rational choice expectations of his model. To this end, Garrett argues that the European Court’s decisions are generally reflective of the preferences of Germany and France, citing specifically, the general Franco-German stance for “mutual recognition of national standards.” It thus follows from Garrett’s line of reasoning that *Cassis de Dijon* “firmly established the principle of ‘mutual recognition’ as the foundation of EC law. . . . [;however,]. . . the court has been unwilling to extend the scope of this essentially deregulating and laissez-faire doctrine to other areas of economic activity, including precisely those cherished by the French and German governments.”⁶² Thus, Garrett suggests that the Court is merely a tool of the Member States, especially France and Germany. While Germany clearly fought the case prior to the decision, Garrett argues that Germany’s win-win situation allowed Germany to gladly--and rationally--accept the decision as the

⁶¹ Ibid.

⁶² Garrett, “International Cooperation,” 558-559.

protector of German business, as a good European and as a champion of trade liberalisation.

As can be expected, Mattli and Slaughter take exception to such an explanation. To begin, Mattli and Slaughter simply refute Garrett's claim that the Court acts consistently with the preferences of France and Germany and argue that in *Cassis de Dijon*, Germany strongly opposed the Court's ultimate decision. Instead, Mattli and Slaughter cite Stein's argument "that the Court follows the lead of the *commission*, using it as a political bellwether to ascertain how far member states can be *pushed* toward the Court and the commission's vision of maximum integration."⁶³ Moreover, Mattli and Slaughter claim that the European Court has functioned to "systematically. . . override member states' true preferences as perceived by individual states at the time and . . . to impose constraints on the ability of those states to fight back."⁶⁴ Given that "preferences" feature so prominently in the analysis of both Garrett and Mattli and Slaughter, the latter identify three specific categories of state preferences: (1) "an effective dispute resolution system," (2) "pace, scope, and degree of European integration" and (3) "specific economic and political preferences in individual cases."⁶⁵ In the first category, Mattli and Slaughter agree with Garrett's claim that the Member States desire an effective dispute resolution system. To explain, Mattli and Burley point out that the EU's resolution system is much more effective than that of the United Nations, for example. Further,

⁶³ Burley and Mattli, "Political Theory," 51.

⁶⁴ Mattli and Slaughter, "Law and Politics," 184.

⁶⁵ *Ibid.*

they argue that the real strength of the Court comes not from the right to hear cases as assigned in Articles 169 (EEC) and 170 (EEC) but from the success of the Court's use of its power of preliminary rulings in Article 177 (EEC) to essentially fashion the corpus of European law.⁶⁶ Second, Burley agrees with Pierre Pescatore and argues that the Court has "*une certaine idée de l'Europe* (a certain idea of Europe)"⁶⁷ which manifests itself in the Court's decisions, albeit behind the "mask of law." This runs contrary to Garrett's claim that the Court acts in favour of the most powerful Member States since according to the neofunctionalists, the Court's motivation is to increase integration, and to the neorationalist, the Court's *raison d'être* is to serve the largest Member States. Third, Burley argues that Garrett's claim that the Court considers the preferences of the Member States violates "the most basic precepts of the rule of law," and that *if* the Court did behave according to the preferences of the Member States, "it would quickly get a reputation for arbitrary and capricious 'political' decisions, thereby undermining its legitimacy."⁶⁸

Mattli and Slaughter take further exception at Garrett's reasoning. First, Mattli and Slaughter suggest that Garrett's model contains the premise "that the law itself cannot guide decision,"⁶⁹ which they effectively disprove. Although they concede that the law may be ambiguous, they accuse Garrett of embellishing the ambiguity much beyond reality in his arguments that the Court

⁶⁶ Ibid., 184-185.

⁶⁷ Ibid., 185. Mattli and Slaughter quote from Pierre Pescatore, "The Doctrine of Direct Effect: An Infant Disease of Community Law," *European Law Review* 8 (June 1983): 155-177, particularly page 157.

⁶⁸ Ibid., 185-186.

⁶⁹ Ibid., 186.

considers the political and economic interests of the Member States when rendering its decisions.⁷⁰ In contrast, Mattli and Slaughter argue that the decision in *Cassis de Dijon* precisely proves that the Court decided not according to the preferences of the Member States but in line with the Treaties, the advocate generals' opinions and academic writings. Finally, in Mattli and Slaughter's examination of Garrett's model, they argue that it fails as it pointed to non-compliance by Germany in *Cassis de Dijon* rather than compliance, which was actually Germany's course of action.

Although Mattli and Slaughter's arguments are concise and for the most part correct in their assertions, the analysis suffers from its attempt to utilise the "mask/shield concept" as the catch-all for explaining the Court. The mask/shield explanation is particularly unattractive as a means of explaining integration because it fails to appreciate the constraints the Member States have outlined in the Treaties and hence suggests that the Court has a virtual "free hand" to push integration forward without resistance. While law is doubtlessly shielded to some degree by its technical nature and the Court may mask certain decisions behind the veil of law, exaggeration of this concept simply oversimplifies the role of the Court and underestimates the power of the Member States: in short, such simplicity ignores reality. To refer back to the architect's compromise, the client commissions the architect, not vice versa. Similarly, the Court can only operate within the area of authority granted to it by the Member States. Furthermore, Mattli and Burley's assertion that

⁷⁰ Ibid.

“without understanding the way lawyers and judges think and reason on their own terms, it is impossible to grasp the mask/shield concept we put forward”⁷¹ is unconvincing in its attempt to prove its superiority over Garrett’s. While judges and lawyers may have a different perspective on integration, the purpose of models of integration is to explain these processes. By defending neofunctionalism while attacking neorationalism based on unexplained discipline-specific logic, Mattli and Slaughter neither prove neofunctionalism valid nor invalidate Garrett’s neorationalist model (which, however, is damaged by other criticisms). Mattli and Slaughter do well to point out the inconsistencies in Garrett’s analysis; however, the concept of the Court marching toward increasing integration, hiding behind the shield of law whilst Member States remain helpless to either curtail the powers of the Court or to direct the speed and depth of integration is rather unbelievable. The discussion of *Cassis* below is aimed to consider the interpretation of the architect’s compromise model.

Cassis de Dijon Revisited

In applying *Cassis de Dijon* to the architect’s compromise model developed previously, a clearer understanding of the actions of the Court can be illustrated. To examine the *Cassis* decision, the five assumptions of the architect’s compromise will initially be reviewed. Then, the model will once again be presented and subsequently, applied to this case. Next, the

⁷¹ Ibid., 187.

assumptions of the architect's compromise will be contrasted against the models by Garrett and Mattli and Slaughter. Finally, conclusions will be drawn on the validity of the architect's compromise.

First, we assume the primary actors in the case to be the Court and the Member States. A cursory examination of the case reveals four players: the ECJ, the *Bundesmonopolverwaltung für Branntwein*, the *Hessisches Finanzgericht* and Rewe-Zentral AG. While individuals undoubtedly compose the structure of each of these entities, the four acted as individual units rather than as a collection of personalities and preferences as neofunctionalism might suggest. Furthermore, even with four distinct players wrestling over the ultimate decision, only two actors emerge under closer consideration. To explain, the four players, while distinct entities in their own right, can all be reduced to either the Court or the Member State (in this case Germany). Clearly, the Federal Monopoly represented the German interests, and the Court itself certainly must be acknowledged as an actor. As for Rewe and the *Hessisches Finanzgericht*, it would be a mistake to recognise either or both on the same level as either the Court or Germany. First, the *Hessisches Finanzgericht* merely acted as a conduit through which the matter was brought before the Court. While the action of the *Hessisches Finanzgericht* might attest to the effective structural development of the European legal system, it must be borne in mind that the Member States laid the foundation and allowed the creation of this system. Second, Rewe did initiate the case and provided the impetus for the Court to resolve a particular issue not explicitly mentioned in the Treaties; however, the Member States committed themselves to the market,

and thus, the events should be seen as evidence of resolution of incomplete contracting problems. To explain, the Court's decision in the case was indicative of the ECJ's responsibility to interpret and formulate the aims of the Treaties to create an effective legal structure for the Communities. Although it is more descriptive--as in the neofunctionalist pattern--to recognise all the players and the personalities within them, such description renders analysis problematic at best and without simplification, precious little can be explained. Moreover, description might add to the overall knowledge of an issue, but it fails to provide critical understanding.

Second, both the Court and the Federal Republic of Germany--the two primary actors--did act entirely rationally. First, the Court vigorously pursued further integration. Greeting *Cassis de Dijon* as an opportunity to eliminate situations through which Member States were able to create obstacles to trade, Advocate General Capotorti, enthusiastically realised the impetus for integration that the case possessed. According to Capotorti,

This new Rewe case presents the Court with the opportunity to tackle the problem of the limits within which the member-States are still free to make the marketing of certain categories of products, whether national or imported, conditional upon the presence of certain characteristics, thereby creating an obstacle to the importation of foreign products within those categories which do not possess the requisite characteristics.⁷²

Likewise, Germany, calling for "the protection of the consumer against fraud and against dangers to his health and the maintenance of fair competition,"⁷³

⁷² *Cassis de Dijon*, CMLR, 496-497.

⁷³ *Cassis de Dijon*, ECR, 657.

determinedly argued against the case. Likewise, Germany had the additional incentive of greater protection of Germany industry in the Federal Republic in the event that Germany won the case.

Third, the Court played the role of a strategic actor. It has already been established that the European Court of Justice, as the architect of the legal foundation of the Communities, has a vested interest in their success. Furthermore, the comments by Capotorti above confirm the argument that the Court does act in a strategic manner. Without labouring the point unnecessarily, it will be simply stated that the decision in *Cassis de Dijon* reflects the Court's preference for further integration rather clearly, and many have heralded the decision to be truly groundbreaking.⁷⁴ Hence, the ECJ was successful in enhancing the integrity and effectiveness of the Communities.

Fourth, modified preferences prevailed. Although Germany may have preferred maintaining relatively high limits on alcohol content--reputedly to curtail overconsumption and to protect the consumer against unknowingly purchasing a lower-content alcohol at a higher price--of liqueurs sold in the Federal Republic, Germany's commitment and desire to achieve a single market transcended both the health and fraud arguments. Thus, Germany was able to fight vigorously against a case it regarded as hostile to the temporal preferences of Germany. However, as Germany's modified preferences allowed certain

⁷⁴ See Alter and Mcunier-Aitsahalia, for example.

compromises for the achievement of the single market, the Federal Republic could accept the ultimate decision.

Fifth, the architect's compromise suggests that the Member States will ultimately accept the decision of the Court as long as such a decision conforms to modified preferences. In *Cassis de Dijon*, this is precisely what occurred. The Court ruled against the German Federal Monopoly, and the German government acquiesced to the decision since it conformed to Germany's modified preferences for achieving the single market. Whilst the case did, in fact, contribute significantly to further economic integration, the decision should hardly be regarded as remarkable, however. In contrast, it is the natural outcome of decisions made by Member States several decades previously when they committed themselves to a common market (and have remained continually committed since). The Court, merely interpreting the intent of the Treaties and recognising the Member States' continued support of the European project, furthered the cause of integration by establishing the principle of equivalent effect in its ruling on *Cassis de Dijon*.

Having reviewed the specific assumptions, we will now examine the model more closely. In its deliberations, the Court sought to maximise its expected utility (AEU) from the action (a) it pursued from the set $A = \{a_1$ (decision resulting in deeper integration), a_2 (decision that is neutral to integration) and a_3 (decision that obstructs integration)}. From the set A, the Court's ruling in *Cassis de Dijon* can be accurately represented as a_1 , given that

it led to deeper integration. Specifically, the decision led to the establishment of the principle of mutual recognition, a cornerstone of Community law.

Having further established above that the Court pursued action a_1 , we shall now determine the state of nature that prevailed at the time of the *Cassis de Dijon* decision. To review, the actions of the Court are made against the prevailing state of nature (m) which is represented by the set $M = \{m_1 \text{ (modified preferences of the Member States reflect pro-integration sentiments), } m_2 \text{ (modified preferences are ambivalent to integration) and } m_3 \text{ (modified preferences are hostile to integration)}\}$. A superficial view of the case might suggest that the prevailing state of nature could be characterised by m_3 . After all, Germany *opposed* Rewe's request to import Cassis de Dijon. However, recalling that the set S contains not the unbridled wishes of the Member States, but rather the modified preferences, m_3 loses its ability to capture the essence of the state of nature which prevailed at the time of *Cassis de Dijon*. It is on this point--or more precisely, the actions and motivations of the Federal Republic--that the present research runs counter to the notions of Mattli and Slaughter and we now turn our attention to examining their argument.

According to the logic of Mattli and Slaughter, it might be argued that the opposition by the Federal Republic proves that Germany, harbouring anti-integration notions, was outwitted by a pro-integration Court--hiding behind the shield of law--which was able to push integration beyond the will of the Member States. As imaginative as it all might sound, this explanation simply falls short of providing a critical explanation. First, the notion that the Court "pushes"

Member States toward integration is misplaced: the Member States *committed* themselves to the idea--perhaps not fully realising the twists and turns such a commitment might bring, however--of an integrated European Community when they became signatories to the Treaty of Rome (and subsequently have voluntarily remained in the Communities for this specific reason). While the Member States could not specifically predict the events that would be necessary to achieve the aims of this Treaty, it is unwise to argue that they are being "pushed" against their will. The fact remains that the European Communities is a concert of states, which depends upon satisfaction from its Members in order to exercise its powers. Second, while Mattli and Slaughter might be correct in maintaining that the Court is able to override Member States' unbridled preferences in particular cases dealing with specific economic or political matters, this is no longer the case when one considers the modified preferences in lieu of these "unbridled preferences." Specifically, the fact that Germany fought hard to protect its domestic wine producers against increased competition from Cassis de Dijon simply reflects an unbridled preference. In contrast, realisation of the single market--a goal to which Germany was firmly committed--requires Member States to approach Court decisions according to their modified preferences rather than their particular short-term political and economic preferences. Finally, the argument that Germany accepted *Cassis de Dijon* because the Court ingeniously masked its decision behind the guise of that technical field "law" suggests that Germany is opposed to the achievement of the single market and only accepts Court decisions because of the Federal

Republic's inability to realise the true role of the Court: the success of the European Communities.

Following the above logic, it becomes clearer that the state of nature could be characterised not by m_3 but by m_1 (pro-integration sentiments). This research departs from Garrett's in a very important manner on this point: specifically, this research argues that the Member States have two sets of preferences. First, they hold specific short-term political and economic preferences which are unrelated to the process of Community-building and consist of their unbridled self-interests as states. Second, the Member States possess what we have come to refer to as modified preferences which, as has been argued, are inextricably intertwined with the Member States' desire to derive full benefits from membership in the Communities. It is the interaction of these two--often conflicting sets of preferences--which allows the Member States to both argue against the Court and to ultimately accept the decision (as long as the decision conforms to modified preferences).

While Garrett provides several reasons which suggest Germany faithfully played the part of a rational actor within the confines of his game-theoretic model, a closer examination reveals inconsistencies in such logic. Initially, Garrett argues that Germany had very little reason to fight the case from an economic perspective; however, he attributes Germany's willingness to fight the case due to its desire to appear to protect German industry and to avoid the political fallout from loss of the German market share by domestic producers. Thus, Garrett appears to suggest that Germany had little impetus to actually win

the case. Accordingly, Germany should have not fought vigorously; however, Germany did, as Mattli and Slaughter are correct to point out. Finally, the idea that Germany's "strategic calculus changed" is difficult to argue from a game-theoretic perspective, as an actor's preferences--by definition--remain constant.⁷⁵

Contrary to Garrett's suggestion that Germany showed relatively little opposition to the case, Mattli and Slaughter are more correct in arguing that Germany did mount a serious effort to win the case. For if Germany, or specifically the *Bundesmonopolverwaltung für Branntwein*, was willing to acquiesce to the wishes of Rewe-Zentral to allow the importation of Cassis de Dijon from the outset of the case, there would have been no reason for the case in the first place. Having said that, however, what is at issue here is not whether Germany fought against a decision of the *Bundesmonopolverwaltung* but why Germany accepted the decision.

Having examined the case through the assumptions of the architect's compromise, conclusions will now be drawn from the expected utility equation that is used to suggest the actions of the Court according to the model to determine if the model adequately explains the events. Given that (1) we assume the Court to maximise its expected utility, (2) we have determined that the Court pursued action a_1 and (3) we have found that the state of nature was characterised by m_1 , we can predict that the outcome can be represented by o_1

⁷⁵ According to James Morrow, "Preferences over outcomes are assumed to be fixed. They do not change during the course of the decision being examined." (Morrow, 19)

as indicated in the model. In fact, o_1 is exactly what did occur: Germany accepted the decision, the Court decided in favour of further integration and further integration proceeded. From the above discussion, the decision in and the events surrounding *Cassis de Dijon* conform to the architect's compromise model. The architect's compromise adequately reflects the actions of the Court with respect to the Member States and thus cogently explains the integration process. To further test the model, a number of cases will be examined throughout the remainder of this research project, including *Francovich and Bonifaci v. Italy* below.

Francovich and Bonifaci v. Italy

Having determined that *Cassis de Dijon* conforms to the architect's compromise model, we now turn to a more recent court decision, *Francovich and Bonifaci v. Italy*. Before evaluating the case in terms of the architect's compromise, a brief review of the facts of the case will be presented. Then, the case will be measured against the game-theoretic model developed by this thesis. Finally, conclusions will be drawn on the suitability of the architect's compromise as an explanation of the Court's role in European integration and the acceptance of decisions by Member States.

The case of *Francovich and Bonifaci v. Italy*⁷⁶ grew out of the Italian government's failure to implement a Directive by the prescribed date. Directive 80/987⁷⁷ required the Member States to provide protection for employees in the case of insolvency by their employers. The deadline for the enactment of such protections was 23 October 1983, and as the result of Italy's failure to enact legislation by that date, the Commission brought suit against the Italian Republic in 1989, at which time the Court found Italy at fault.⁷⁸ *Francovich* arose out of two separate claims by Andrea Francovich, who was owed approximately six million Lira by CDN Electronica SnC, in Vicenza, and by Danila Bonifaci, who together with 33 other employees, was owed approximately 254 million Lira by Gaia Confezioni Sr. After unsuccessful attempts to recover the sums owed to them, the plaintiffs filed suit against the Italian Republic, Francovich in the *Pretore di Vicenza* and Bonifaci in the *Pretore di Bassano del Grappa*. Believing that Italy was bound by the provisions of Directive 80/987 after 23 October 1983, the plaintiffs sought damages against Italy for the Republic's failure to enact the directive. As the two separate Italian courts regarded the cases as European matters, both cases were referred to the European Court of Justice for a preliminary ruling, on 9 July 1989 for the former and on 30 December 1989 for the latter.

⁷⁶ For a full explanation of the case, see *Francovich v. Italy*. Deirdre Curtin provides a thorough discussion in "State Liability Under Community Law: A New Remedy for Private Parties," *International Law Journal* (1992): 74-81.

⁷⁷ Council Directive 80/987, *Official Journal* (1980), L 283/23.

⁷⁸ See Case 22/87, *Commission of the European Communities v. Italian Republic*, *European Court Reports* (1989): 143-173.

Three identical questions were posed to the Court for preliminary rulings in the two cases. The first question essentially asked if Council Directive 80/987 had direct effect and what the state liability for breach of its obligations was under Community law. The second asked if the Member State was required to pay claims of the employees in the event that it failed to lay down limits as specified by the directive. Finally, the third question asked, in the case of the second question being answered negatively, what was the minimum guarantee the Member State must provide as to comply with the directive.

In its decision, the Court determined that the Italian Republic was liable for damages in the case. Specifically, the Court considered the three questions above in the following manner. With regard to the final two questions, the Court did not issue a ruling, considering the answer to the first question to be sufficient. In answering the first question, the Court ruled that despite Italy's failure to enact the directive, the plaintiffs could not enforce rights against the state for the simple reason that implementation measures had not been adopted. However, the Court further ruled that despite its finding that the directive did not have direct effect, "the member-States are obliged to pay compensation for harm caused to individuals by breaches of Community law for which they can be held responsible."⁷⁹ Thus, although the Court did not regard the directive as having direct effect, it was nonetheless reasoned that the Italian Republic was "required to pay compensation for the harm suffered by individuals as a result of the failure to implement Directive 80/987."⁸⁰

⁷⁹ *Francovich v. Italy*, CMLR, 114.

⁸⁰ *Ibid.*, 115.

Having reviewed the facts of the case, we are now in a position to analyse *Francovich v. Italy* through the architect's compromise model. To begin, it may appear that the actors in the case could be identified as Andrea Francovich, Danila Bonifaci et al., the Italian Republic, the *Pretura di Vincenza*, the *Pretura di Bassano del Grappa*, the European Commission, the Netherlands, the United Kingdom and Germany. However, as was the case in *Cassis de Dijon*, the number of actors that had a significant role in the process is far less. First, neither the *Pretura di Vincenza* nor the *Pretura di Bassano del Grappa* played a significant role in the case. Requesting a preliminary ruling in accordance with Article 177 of the EEC Treaty, the two Italian courts functioned as a conduit by which the case was brought before the European Court of Justice; they were not involved in the final decision of the case. Furthermore, of the plaintiffs, Francovich and Bonifaci (and her colleagues), neither affected the decision the Court ultimately made. That their actions resulted in an example of resolution of incomplete contracting problems suggests that the Member States and the Court determine the pace and depth of integration, regardless of which forces identify an incomplete contracting issue. Similarly, the Commission functioned like the plaintiffs: it served to identify an incomplete contracting issue, which was subsequently resolved by the Court. While the Commission presented a pro-integrationist statement, arguing even that the directive should have direct effect,⁸¹ its comments could be no more than advisory since the ultimate decision of the case lay in the hands of the

⁸¹ Gerhard Bebr, "C-6/90 & C-9/90, *Francovich v. Italy*, *Bonifaci v. Italy*," *Common Market Law Review* 29 (1992): 559.

Court. Once again, it must be borne in mind that while the Commission may put forth arguments, the Court is dependent upon the continued support of the Member States to maintain its relevance. With regard to the Member States that participated in the case, their statements can be viewed as reflective of their unbridled preferences: they unanimously argued that state liability was essentially a national concern and should be resolved under national law, not Community.⁸² While state preferences do play an important role in Court decisions, the Court--as will be further explained below--considers the modified preferences of the Member States in formulating a decision, rather than such unbridled preferences. Next, the Italian Republic can be reasonably assumed to occupy the role of one of the more significant players in the case, as can the Court. Given that neither the Commission, the plaintiffs nor the Italian courts played a role in the actual court decision and that the statements of the Member States merely reflected their unbridled preferences, we can assume only the Italian Republic and the Court to be the primary actors.

Second, we assume the actors to be rational. First, the Italian Republic fought consistently against the Directive 80/987, even evading a prior European Court decision which identified Italy's failure to comply with the directive⁸³ as was described previously. Arguing "that the provisions of Directive 80/987 cannot be considered to be unconditional and sufficiently precise," the Italian Republic thus maintained that it was not "obliged to ensure that all the conditions set out in the directive were met in order for individuals to be able to

⁸² Ibid., 560.

⁸³ See *Commission v. Italy*, ECR.

enforce their rights.”⁸⁴ Plainly, the Italian government’s unbridled preference for not being held liable in the case necessitated challenging the claims of Francovich and Bonifaci. Similarly, as has been argued, further integration is a preference of the Court. As will be demonstrated below, such an increase in integration is precisely the action the Court took.

Third, the Court played the part of a strategic actor. As an ultimate goal of the Court is the success of the European Communities, it can be expected that the Court would have judged in favour of integration, which is precisely what did occur. However, the Court was careful in not too vigorously pursuing such increased integration. Specifically, the Court stopped short of interpreting the case to conform to direct effect. Instead, the Court took a more cautious interpretation, holding Italy nonetheless liable for damages. By refraining from declaring that the directive had direct effect although simultaneously finding Italy liable, the Court strategically moved the integration process forward without eliciting opposition from the Member States. According to P. P. Craig, “The judgment furnishes a prime example of the style of legal reasoning employed by the European Court of Justice, being purposive and teleological in nature, while drawing upon general Articles of the Treaty, in this instance Article 5, for support.”⁸⁵ Thus, the Court was careful to strategically deepen integration, while basing its decision legitimately on the Treaty.

⁸⁴ *Francovich v. Italy*, ECR, I-5365.

⁸⁵ P. P. Craig, “*Francovich*, Remedies and the Scope of Damages Liability,” *The Law Quarterly Review* 109, no. 11 (1993): 597.

Fourth, modified preferences prevailed. In contrast to the positions taken by the Member States, the outcome conformed to another standard. As is evidenced in the opening arguments, the Member States were uniformly opposed to an extension of Community authority in this area at least in terms of their unbridled preferences. However, once it is recognised that this is yet another example of the necessity of such a measure for the proper functioning of the Union, the calculus changes, and the Member States' modified preferences reflect the notion that they must accept certain measures to achieve the single market. According to Helen Smith, "If a Member State goes beyond its powers or otherwise violates its obligations, it follows that those individuals adversely affected have been denied their rights and should therefore be entitled to sue for any quantifiable damage caused. Otherwise, the full effectiveness of Community law would be jeopardised."⁸⁶ Accordingly, the Member States must ultimately sacrifice their unbridled preference and replace them with modified preferences to achieve the full benefits of the Communities.

Fifth, the decision was accepted as it conformed to modified preferences. As has been previously demonstrated, the Member States argued forcefully against the case; however, unlike Italy's evasion of the directive as determined by Case 22/87, *Francovich* has been accepted by the Member States and has subsequently functioned as a "watershed" in the development of the Community.⁸⁷ As the Court declared in its judgement, through Article 5 of the

⁸⁶ Helen Smith, "The Francovich Case: State Liability and the Individual's Right to Damages," *European Community Law Review* 3 (1992): 131.

⁸⁷ Malcolm Ross, "Beyond *Francovich*," *The Modern Law Review* 56 (January 1993): 55.

Treaty, the Member States have bound themselves “to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law.”⁸⁸ It follows that the Member States *must* commit themselves to these obligations or the benefits of the Communities cannot be realised.

Having confirmed that the assumptions of the architect’s compromise are applicable to *Francovich v. Italy*, we turn our attention to the model itself. Initially, we can see that that a_1 was selected from the set A by the Court since the ruling clearly supported the integration process. Next, we could characterise the state nature as either s_1 or s_2 since the modified preferences suggest that the Member States were not opposed to further integration. Given that the Court selected action a_1 and that the state of nature conformed to either m_1 or m_2 , the architect’s model suggests that the decision would be accepted by the Member States regardless if the Member States later decided to alter the powers of the Court. Thus, the model reflects the actual outcome of the case. Hence, the architect’s compromise appears to offer a useful means by which to explain the European Court of Justice’s role in European integration. As with the *Cassis de Dijon* decision, the applicability of the architect’s compromise in *Francovich v. Italy* adds further credence to the value of the architect’s compromise model as a means by which to explain European integration. The remainder of this research project will further examine the model in the aim of

⁸⁸ *Francovich v. Italy*, ECR, I-5414.

providing a rigorous alternative to Slaughter and Mattli's neofunctionalist and Garrett and Weingast's neorationalist models.

Conclusion

In this chapter, we have examined a debate that has emerged between proponents of neofunctionalism and neorationalism in the analysis of the European Court of Justice. Initially, we identified shortcomings of both of these models; however, we also identified their respective strengths. From these strengths extracted from present neofunctionalist and neorationalist models, we developed the architect's compromise game-theoretic model as an alternative explanation. This model was subsequently tested against two landmark case, and through the analysis, it was concluded that the architect's compromise provides a sound explanation of the role of the European Court of Justice in the process of European integration. Having recognised the importance of the Court in the construction of the European Communities, it is the hope of this research that such a model will provide the foundation for further study of the European Court of Justice and the Member States through the lens of game theory as a means to greater understanding of the European Union. The next two chapters will further elaborate on the architect's compromise model by critically examining its five assumptions in preparation for testing the model against the cases involving the doctrine of supremacy in the United Kingdom and Germany.

Chapter III

The Architect's Compromise: The Actors and Constitutionalism

Having laid the foundation for a game-theoretic model of the Court's role in European integration, the five assumptions upon which the architect's compromise model is based will be examined in full. In this chapter, the logic of selecting the Court and the Member States as the primary actors will be presented and explained. In addition, a large portion of this chapter will be devoted to evaluating the "constitutional foundation" of the European Communities since this exerts a significant influence on both the Court's authority and the integrity of EC law vis-à-vis the national legal systems of the separate Member States. While it has become common to refer to the Treaties as a "constitution" of the Communities, this research is concerned that such a convention overlooks the true lack of constitutional legitimacy held by the Court. Hence, the actual "give and take" relationship between the Court and Member States is largely disregarded: specifically, the response by the Member States to Court decisions, largely neglected by theories such as neofunctionalism, must also be examined to understand the actual process which leads to further integration. Moreover, such a simplistic approach, while descriptive, fails to recognise the constraints under which the Court operates which will be examined in this chapter and in the next. The purpose of this chapter is thus to more correctly describe the mutually dependent relationship

between the ECJ and the Member States and justify their inclusion as the primary actors in the architect's compromise model of integration. Owing to the importance of the issue of constitutionalism and the discussion it warrants, the remaining four assumptions of the architect's compromise then will be discussed in Chapter IV.

The Actors: The Court and the Member States

As was outlined in the previous chapter, it is assumed that the European Court of Justice and the Member States are the primary actors. As this study is strictly focused on the Court's role in the process of European integration, no claims will be made concerning the impact of other actors upon integration in other spheres of activity, such as the activities of the European Parliament, the Commission or the Council, as this would be beyond the scope of this analysis. Additionally, the term European integration will be used solely in the context of the Court's role unless otherwise specified. Notwithstanding the fact that a host of players above and below the state have a strong impact on the process of integration, the Court ultimately owes its legitimacy to the Member States, and the Member States must accord respect for the jurisdiction of the Court to reap the benefits of the Communities. Hence, the architect's compromise model adopts the interaction between the Member States and the Court as the most appropriate level of analysis; the following discussion will justify this position.

Initially, the architect's compromise model identifies the Member States and the Court as the primary actors according to their practical influence upon

European integration. To explain, any number of individuals and groups--including lawyers, academics, individual politicians and special interest organisations--do, in fact, make contributions to the process of integration. However, it must be stressed that recognising the importance of individuals and groups is not a concession to neofunctionalism, remembering that neofunctionalism suggests that only through the study of all these actors above and below the state can integration be explained. On the contrary, this study believes such an explanation can be derived by studying the outcome of all these internal forces. The following discussion will address these points in turn.

To begin, it cannot be overemphasised that the European Communities are the product of deliberate decisions of the Member States to initiate and perpetuate these institutions. Accordingly, the initial six Member States pledged "to lay the foundations of an ever closer union among the peoples of Europe."¹ Obviously, the Member States could not have predicted the details of this proposed union; however, it is clear that by ratifying the Treaties and subsequently retaining membership in the Communities that the Member States believe the benefits of membership compensate for any loss of sovereignty they must countenance. Furthermore, the Member States joining in 1973, 1981, 1986 and 1995 pledged themselves to the same project, and by association, have agreed to abide by the body of European law both that existed prior to their membership and that has been adopted subsequently, thereby indicating the same desire to achieve such a European Union.

¹ *Treaty Establishing the European Economic Community (EEC), Preamble.*

In examining the impact of other possible players on Court deliberations, the necessity of limiting the actors in the model to simply the Member States and the Court becomes evident. First, as has been previously mentioned, the neofunctionalist notion that "the primary players in the integration process are above and below the nation-state"² is misplaced, since the process of decision-making in the Court and the institutional dynamics of the European Communities conflict with this neofunctionalist claim. Second, the institutional structure of the Communities must be examined in light of the true impact they exert upon Court proceedings to illustrate the constraints which frame the decisions of the ECJ. Third, the actions of the Member States in cases and in accepting or rejecting rulings must be critically examined: such an examination will demonstrate the pivotal role of the Member States in European integration, justifying the logic behind the architect's compromise model.

Although individual personalities themselves and the variety of institutions which they might compose inevitably influence Court decisions, the actual decisions belong to the Court itself. To explain, regardless of the fact that individuals,³ Member States or European institutions are responsible for the particular case brought before the Court, the decision of the Court is a product

² Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration," *International Organization* 47, no. 1 (Winter 1993): 54.

³ Much has been made over the diversity of individuals involved in legal integration. To begin, the existence of various legal systems undoubtedly complicates--and enriches--the Court's jurisprudence. Furthermore, the ever-increasing number of languages of the Court further complicates the activities of the Court. However, most experts point out that such difference are approaching negligibility in terms of the integration process. See, for example, Giuseppe Federico Mancini, "Crosscurrents and the tide at the European Court of Justice," *Irish Journal of European Law* 2 (1995): 120-133, especially 121-125.

of the consensus reached in the judges' chambers. Therefore, in the decision-making procedures of the Court, only those actors which are allowed to be a party to Court proceedings are relevant to be considered actors in the architect's compromise model. Accordingly, we will consider the Court, the Commission, the Council, the Parliament, the Member States and other persons or bodies⁴ to justify the selection of the Court and the Member State (or States) as the primary actors in the model.

The Court as an Actor

As the subject of this study, and as the decision-maker in the architect's compromise model, the Court must be recognised as an actor in the model. However, in addition to appreciating its status as an actor, it should also be characterised as a single, unitary actor. While such an assumption runs counter to neofunctionalist claims and, on first appearance, might seem rather simplistic, such a notion of the Court as a single, unitary actor is the only assumption that can be logically made. To explain, the composition, the structure and the decision-making procedure of the Court all suggest that the Court is most correctly identified as a single unit, as will be subsequently examined in full.

⁴ See K. P. E. Lasok, *The European Court of Justice: Practice and Procedure* (London: Butterworths, 1994), 108.

The Court: An Overview

Before engaging in a full discussion, it is useful to provide a brief overview of the composition of the Court. The Court consists of fifteen judges⁵ and nine advocates general.⁶ “Chosen from persons whose independence is beyond doubt,” the Members of the Court are “appointed by common accord of the Governments of the Member States for a term of six years.”⁷ Appointed by the Court,⁸ the Registrar “has the same court duties as the registrar or clerk of a national court, but he also acts as secretary-general of the institution.”⁹ The Registrar is not a Member of the Court, and the conditions regarding appointment are outlined in the Rules of Procedure.¹⁰ The Members of the Court are assisted by a staff of translators, legal advisors and administrative personnel.

The Court as a Single, Unitary Actor

As it is the Members of the Court who grapple over the cases brought before the Court, we will now focus more extensively on the dynamics¹¹ of this

⁵ EEC, Article 165.

⁶ EEC, Article 166.

⁷ EEC, Article 167.

⁸ EEC, Article 168.

⁹ *The Court of Justice of the European Communities* (Luxembourg: Office for Official Publications of the European Communities, 1995), 9.

¹⁰ See Lasok, 21.

¹¹ The procedure of the Court consists of three phases: (1) a written phase during which the plaintiff will submit a written claim, after which, the defendant will be given an opportunity to lodge a response. Then, the plaintiff may write a response, after which, the defendant will once again have the opportunity to do the same; (2) a preparatory enquiry phase at the discretion of the Court for the purpose of collecting additional information regarding the case; and (3) an oral stage consisting of oral hearings on the

group. Of paramount importance is the manner in which the Court functions as a cohesive unit. Upon taking office, Members pledge to “perform. . . [their] duties impartially and conscientiously. . . [and to] preserve the secrecy of the deliberations of the Court.”¹² Hence, the Court maintains a sense of privacy regarding its workings and thus protects itself from possible criticism by restricting public knowledge of its workings. This, in turn, fortifies the idea that the Court operates as a single unit. Furthermore, each Member is required to sign “a solemn declaration that, both during and after his term of office, he will respect the obligations arising from his office, in particular the duty to behave with integrity and discretion regarding the acceptance of ‘certain appointments or benefits’ after he has ceased to hold office.”¹³ Hence, even after leaving the Court, Members must remain discreet in their actions, which further limits public understanding of the events that take place within the judges’ chambers. Given such restricted access to the workings of the Members of the Court, it is very difficult, if not impossible, to characterise and examine the Court except as a unit defined by congruity and continuity.

The conventions which constitute the decision-making process of the Court further suggest that the Court functions as a single, cohesive unit. While it is common knowledge that French¹⁴ serves as the working language in the judges’ chambers, little more is clear concerning the deliberations. Specifically,

case. See D. Lasok and K P. E. Lasok, *Law and Institutions of the European Union* (London: Butterworths, 1994), 247-249.

¹² Lasok, 16.

¹³ Ibid.

¹⁴ Carl Otto Lenz, “The Court of Justice of the European Communities” *European Law Review* 14 (1989): 131-132.

deliberations are held in secret.¹⁵ According to Judge David Edward, the deliberations begin as the President of the Court requests the Rapporteur to comment. Judge Edward further explains:

Thereafter, there is open discussion. . . which goes on until a consensus or a clear difference of opinion emerges. If there is a clear difference of opinion, the President will take a vote. The discussion may then continue or it may be left to the Rapporteur to produce a new draft (or a first draft). Once consensus is reached, the Court goes over the Rapporteur's draft page by page.¹⁶

In the voting procedure, the order of votes occurs progressively from the most junior to the most senior judge.¹⁷ Given such a process, a single judgement emerges which is the product of the entire Court. The convention of secrecy ensures that the particular contribution and ideas of individual members of the Court held in private are concealed within a uniform judgement which the public receives, further suggesting that the Court is best characterised as a single, unitary actor.

In addition to the secrecy that surrounds the deliberations of the judges' chambers, no dissenting opinions are given.¹⁸ Such a system is enhanced by the collegiate approach used by the Court in which the separate Members of the Court operate as a single body. Judge Edward further explains:

All members of the Court are responsible, up to the last minute, for making the judgment as good as it can be, even if they disagree with the

¹⁵ EEC, *Protocol on the Statute of the Court of Justice of the European Economic Community*, Article 32.

¹⁶ David Edward, "How the Court of Justice Works," *European Law Review* 20 (1995): 556.

¹⁷ Stephen Weatherill and Paul Beaumont, *EC Law: The Essential Guide to the Legal Workings of the European Community* (London: Penguin Books, 1995), 164.

¹⁸ L. Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities*, 4th ed. (London: Sweet and Maxwell, 1994), 260.

result. The system assumes that there will be perfectly legitimate differences of opinion between judges but that, where such differences exist, the view of the majority must prevail.¹⁹

Through such a collegiate approach, the Court--despite the fact it is composed of judges drawn from various languages, legal traditions and nationalities--inevitably functions as a cohesive unit which ultimately issues a unanimous decision. Judge Ulrich Everling adds “. . . there is frequently particular dispute over questions that leave no trace in the reasoning of the judgment. . . , but reaching agreement on them is so difficult that the Court prefers not to mention them.”²⁰ Thus, the decisions of the Court should be regarded as a collective action, albeit done by individuals, but inevitably taking the form of a single, coherent judgement.

As “the existence and the nature of a disagreement within the court itself is not disclosed,”²¹ the Court can further be thought of as a unitary actor. Advocate General Francis Jacobs suggests that the introduction of dissenting opinions might foster the disintegration of the common jurisprudence the Court has forged “from the variety of legal systems of the Member States.”²² Additionally, Jacobs suggests that “the authority of judgments of the European Court is still relatively fragile, and there is a risk that its judgments would carry less authority if they were not presented as the collective wisdom of the whole

¹⁹ Edward, 556.

²⁰ Ulrich Everling, “The Court of Justice as a Decisionmaking Authority,” *Michigan Law Review* 82 (April/May 1984): 1308.

²¹ Ami Barav, “The Court of Justice of the European Communities,” *The Role of Courts in Society*, ed. Shimon Shetreet (Dordrecht: Martinus Nijhoff Publishers, 1988), 417.

²² Francis G. Jacobs, “The Member States, the Judges and the Procedure,” *La Cour de Justice des Communautés Européennes et les États Membres* (Brussels: Editions de l'Université de Bruxelles, 1981), 16.

Court.”²³ Given the lack of dissenting opinions and the decision-making procedures, it is further apparent that the Members of the Court function as a single unit, bound by secrecy, and issuing unanimous decisions; therefore, the present research is resolute on the necessity to examine the Court as a unit.

The advocates general play an important advisory role to the ECJ by submitting their own opinions on the case. Based on the French *Commissaire du Gouvernement* in the *Conseil d'État*,²⁴ the function of the advocate general in a case is “to ensure that [in] the interpretation and application of the treaties the law is observed”²⁵ by issuing legal analyses on the cases before the Court. Despite this advisory role the advocates general play, the architect’s compromise model does not analyse their contributions separately since they do not participate in the actual decision-making process. Martin Vranken notes that the contribution of the advocates general is undoubtedly of a lesser value than the Court’s since “only the court is the institution that is officially entrusted with the observance of Community law.”²⁶ Thus, although this research will often mention the reasoning of the advocates general, these submission do not play a large role in the architect’s compromise model.

²³ Ibid., 16-17.

²⁴ Kirsten Borgsmidt, “The Advocate General at the European Court of Justice: A Comparative Study,” *European Law Review* 13 (1988): 106.

²⁵ Ibid., 107.

²⁶ Martin Vranken, “Role of the Advocate General in the Law-Making Process of the European Community,” *Anglo-American Law Review* 25, no. 1 (January-March 1996): 60-61.

Other Institutions

Having established that the Court functions as a single actor with respect to the architect's compromise model, the remaining institutions must be examined in terms of their merit to be considered actors in the model to justify the inclusion of only the Court and the Member States. First, it must be recognised that the Commission submits observations in all cases before the Court dealing with preliminary rulings.²⁷ According to Crisham and Mortelmans, such observations "are a useful and sometimes necessary supplement to the frequently unclear questions."²⁸ However, aside from its responsibility in investigating particular cases to provide observations, the Commission can play no particular role in European integration in the theatre of the Court, which allows the architect's compromise model to exclude it as one of the primary actors. Likewise, the Council and Parliament, despite the fact they have both contributed significantly to proceedings before the Court (in lodging observations, for example), play no part in the actual decision-making process. Thus, these institutions are not considered relevant to the architect's compromise model of European integration.

Additionally, to recognise every individual, group, sub- and supra-state actor which has ever brought suit before the Court is simply beyond the scope

²⁷ See Article 177, EEC Treaty. See also C. A. Crisham and K. M. Mortelmans, "Observations of Member States in the Preliminary Rulings Procedure before the Court of Justice of the European Communities," *Essays in European Law and Integration*, eds. David O'Keeffe and Henry G. Schermers (Antwerp: Kluwer, 1982), 56.

²⁸ Crisham and Mortelmans, 56.

of analysis. The fact that particular individuals are unquestionably responsible for initiating cases, presenting evidence and ultimately making decisions fails to undermine the central issue: the Member States, in the EU's present inter-governmental form, are key players in decisional processes. They ultimately decide whether or not to implement decisions and co-operate with the Court, resulting in a bargaining game between the Court and the Member States. Additionally, in the case of legal integration, the Court is the primary actor and, thus, interacts within the structure created by the Member States.

Member States

Although the Member States do not play a particular role in the decision-making within the judges' chambers of the Court, they represent an indispensable force to be examined in any study of the Court's impact upon integration. Ulrich Everling points out the reason for this important position the Member States occupy: "The Community is not a state and also not a federal state but a special system in which the Member States have a dominant role."²⁹ Despite the fact they have clearly ceded elements of their sovereignty to the Court and are thus bound by the decisions of the Court, the Member States have defined and continue to refine the boundaries of European integration. According to Jean-Victor Louis, "While the institutions have received from the treaties an important legislative power, the execution of Community law

²⁹ Ulrich Everling, "The Position of the Court of Justice of the European Communities in its Institutional System," *Polish Yearbook of International Law* 19 (1991-1992), 49.

depends essentially on the Member States.”³⁰ The *Solange*³¹ decisions in Germany illustrate the importance of the Member States in terms of the acceptance ECJ decisions. As will be demonstrated in a Chapter VII, these cases prove that the legitimacy of the Court rests upon the reception of European law by the Member States, and failure by a particular Member State to co-operate with the Court significantly undermines its legitimacy within that state, as is illustrated by *Solange I*. The architect’s compromise model captures this important element by its incorporation of the concept of modified preferences and the inclination of the ECJ to conform to these preferences in issuing decisions.

Since national courts possess the power to refer to the ECJ, and therefore, can grant legitimacy to the ECJ by consistently appealing for preliminary rulings in matters of European law or by strictly adhering to the ECJ’s case law, they play an important role in the expansion of European law. Conversely, the national courts can deprive the ECJ of legitimacy by ignoring its jurisdiction,³² given that “the decision to refer a matter to the Court of Justice

³⁰ Jean-Victor Louis, “Ensuring Compliance and Implementation by Member States,” *European Economic and Business Law*, eds. Richard M. Buxham et al. (Berlin: Walter de Gruyter, 1996), 38.

³¹ See Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *European Court Reports* (1970):1125-1155; Case 2 BvL 52/71, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *Common Market Law Reports* 2 (1974): 540-592; Case 126/81, *Wünsche Handelsgesellschaft v. Federal Republic of Germany*, *European Court Reports* (1982): 1479-1501; Case 2 BvR 197/83, *Re the Application of Wünsche Handelsgesellschaft*, *Common Market Law Reports* 3 (1987): 225-265; Case 2 BvR 2134/92 & 2159/92, *Manfred Brunner and Others v. The European Union Treaty*, *Common Market Law Review* 1 (1994): 57-108.

³² This will be subsequently addressed in full detail with regards to the historical and philosophical positions of national courts to the jurisdiction of the European Court.

rests exclusively with the national court.”³³ Hence, the national courts play an important role as a component of the actor we identify as the “Member State(s).” While national courts over the past few years have largely adhered to Article 177, such respect for preliminary rulings has not always characterised the relationship between national courts and the ECJ. Gerhard Bebr explains the liberty the national courts possess:

Seeking to recognize the supremacy of Community Law the courts encounter obstacles and difficulties originating in the national legal order within which they operate. They apply Community law within the context of their respective constitutional structure and practice influenced and formed by principles, legal thoughts and tradition which differ from one member State to another. To a certain extent these difficulties have preconditioned the various attitudes of municipal courts towards Community Law and its relation to municipal law. They may also explain the hesitancy or even resistance of municipal courts to accept the supremacy of Community Law. Particularly in the early years of the operation of the Community it is hardly surprising that municipal courts viewed this relation through biased glasses, coloured by their traditional constitutional experience and practice. This understandable position, however much it may be regretted, may help to explain the different impacts the Court’s case law has had on municipal courts, and their divergent case law.³⁴

While Article 177 is intended to produce the uniform application of European law in all the Member States,³⁵ it has also allowed the French *Conseil d’État*³⁶

³³ Ami Barav, “The Judicial Power of the European Economic Community,” *Southern California Law Review* 53, no. 1 (November 1979): 510. Article 177, which grants national courts the responsibility to appeal for preliminary rulings, contains the following provisions:

“Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

“Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, the court or tribunal shall bring the matter before the Court of Justice.”

³⁴ Gerhard Bebr, “How Supreme is Community Law in the National Courts?” *Common Market Law Review* 11 (1974): 7.

³⁵ See Case 107/76, *Hoffmann-La Roche AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*, *Common Market Law Reports* 2 (1977): 334-358.

to ignore its responsibility to appeal for preliminary rulings, proving that the ECJ is ultimately dependent upon the separate national institutions for its legitimacy. Given its importance, the behaviour of the *Conseil d'État* in rejecting the authority of the ECJ will be more fully examined in Chapter V.

The Court and Constitutionalism

As was explained in the introduction to this chapter, the Court's so-called "constitutional role" is directly related to the legitimacy of European law, and thus, it is essential to address this concern fully. Specifically, if the ECJ is truly a constitutional court for the Communities, its decisions should not be challenged. However, if the Court is less than a constitutional court, then the Member States retain the authority to guard their respective jurisdictions in opposition to the ECJ. On this particular point, the present analysis must examine the complex and often misrepresented notion of the Court as a constitution-maker.

The debate over whether or not the Treaties establish the constitution for the European Union is fundamental to understanding the authority and legitimacy of the Court. It is the opinion of this research that the Treaties do not establish such a constitution since ultimately authority remains with the separate Member States. Nonetheless, owing to the substantial authority transferred to the Community institutions and the varied and numerous tasks

³⁶ This will subsequently be discussed in greater detail with regards to the establishment and acceptance of supremacy of European law.

which the Communities have been called upon to perform, the Treaties have provided a de facto constitutional framework. There is wide disparity between the Court and the Member States on this issue, with the Court holding that it is such a constitutional court,³⁷ while the Member States have expressed an opposite view.³⁸ Given these contradictory views, a thorough discussion on this matter is warranted.

In his seminal article on the Court, Eric Stein suggests that “the Court has construed the European Community Treaties in a constitutional mode rather than employing the traditional international law methodology.”³⁹ Weiler and Haltern argue that such was the impact of Stein’s article on European legal scholarship that the ECJ was no longer even considered an area within international law.⁴⁰ According to its own assessment, the Court recognises the role it must inevitably play in building a “constitution” for the Communities. Accordingly, the Court stated in an opinion in 1992:

The EEC-Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. . . . The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member State and the direct effect of a whole series of provisions (of Community law).⁴¹

³⁷ See, for example, the Court’s ruling in Opinion 1/91, *Re the Draft Treaty on a European Economic Area*, *Common Market Law Reports* 1 (1992): 245-275; and *The Proceedings of the Court of Justice and Court of First Instance of the European Communities*, no. 15/95 (22 to 26 May 1995): 4.

³⁸ See the *Solange* cases, for example.

³⁹ Eric Stein, “Lawyers, Judges, and the Making of a Transnational Constitution,” *American Journal of International Law* 75 (January 1981): 1.

⁴⁰ J. H. H. Weiler and Ulrich R. Haltern, “The Autonomy of the Community Legal Order--Through the Looking Glass,” *Harvard International Law Journal* 37, no. 2 (Spring 1996): 421-422.

⁴¹ *Re the Draft Treaty on a European Economic Area*, 269.

However, this research holds that although the Court has functioned to shroud the Treaties in a guise of "constitutionalism," the Communities lack a constitution and the Treaties do not fulfil this device in the traditional sense.⁴² Since the third *Solange*⁴³ decision of the *Bundesverfassungsgericht* (German Federal Constitutional Court) in which the German court held that *Kompetenz-Kompetenz* remained with the Member States and not with the Court, this particular issue has been the subject of intense discussion,⁴⁴ with scholars divided on whether or not the Treaties provide a constitution for the Communities. While no consensus exists with regard to the legitimacy for the supra-national character of Community law, it is clear that the "constitution" the Court has fabricated lies on unstable ground. According to Weiler and Haltern, "The Community has adopted constitutional practices without any underlying legitimizing constitutionalism."⁴⁵ This concern lies at the foundation of the present research's assertion that the legitimacy of the Court remains contingent upon the Member States, and hence, this issue will now be examined in full.

⁴² According to Advocate General Francis Jacobs, "In many respects, however, the Treaty does not have the character of a constitution. First, it does not contain many of the general provisions usually found in national Constitutions. In particular, although it guarantees particular social and economic rights, such as the right of men and women to equal pay for equal work and the right of workers and the self-employed to move freely between the Member States, the Treaty does not contain a comprehensive catalogue of fundamental rights. Secondly, the Treaty contains many provisions which would not traditionally be regarded as being of a constitutional character, such as substantive rules on competition." F. G. Jacobs, "Is the Court of Justice of the European Communities a Constitutional Court?," *Constitutional Adjudication in European Community and National Law* (Dublin: Butterworth, 1992), 26.

⁴³ See Brunner.

⁴⁴ See Theodor Schilling, "The Autonomy of the Community Legal Order: An Analysis of Possible Foundations," *Harvard International Law Journal* 37, no. 2 (1996): 389-409; and J. H. H. Weiler and Ulrich R. Haltern, 411-448.

⁴⁵ Weiler and Haltern, 423.

Constitutionalism, Legitimacy and International Law

Lacking a true constitution, the European Union (the Court of Justice specifically) relies upon a precarious source of legitimacy. According to Ulrich Everling,

Courts in States receive their legitimation from constitutions, from which their traditional position obtains its justification. The Court of Justice relies on Article 164 of the EC Treaty, according to which the Court is to ensure that "in the interpretation and application of this Treaty the law is observed." It is, however, not bound in the same way as national courts by a network of institutional relationships, for the constitutional system of the Community has not yet been secured and in part receives its legitimation indirectly from the Member States.⁴⁶

Specifically, the Communities originated from treaties in the style of international law; however, the process of integration has seen the Court's decisions attempt to convert supra-national agreements into a constitutional form. The fundamental problem is that without a true constitution, the legitimacy of the Communities flows not from the Treaties themselves but from the Member States' continued respect for them; therefore, the Court is not wholly independent of the Member States as it possesses no inherent jurisdiction.

In a recent issue of the *Harvard International Law Journal*, Theodor Schilling argues that the Treaties fail to provide a true constitution for the Communities while Joseph Weiler and Ulrich Haltern have taken the opposing

⁴⁶ Ulrich Everling, "Reflections on the Reasoning in the Judgments of the Court of Justice of the European Communities," *Festschrift til Ole Due* (Copenhagen: G.E.C. Gads Forlag, 1994), 58.

view.⁴⁷ A review of the basic aspects of this debate is pertinent to the present discussion. Theodor Schilling adamantly argues that “at its inception, the European Community was clearly a creature of international law,”⁴⁸ and that “the European Treaties are still creatures of international law.”⁴⁹ Schilling further reasons the “ultimate umpire” in the system is not the ECJ since it possesses only “persuasive authority.” Instead, the Member States hold the decisive authority “concerning the scope of the competences they have delegated” to the European Communities.⁵⁰ Finally, Schilling concludes that the Court does not enjoy “exclusive competence” as it adjudicates international law and *not* constitutional. As such, “the ECJ’s reliance on the rule of law can only be rhetorical,” and despite the fact the Court has been highly successful in employing this rhetorical rule of law to gain the compliance of the Member States, the Court derives its legitimacy from the voluntary co-operation of the Members rather than from any so-called constitution which has arisen from the Treaties.⁵¹

The reasoning of Schilling has been challenged by Weiler and Haltern. Conceding that the European Community does, in fact, lack the foundation of a constitution, Weiler and Haltern nonetheless argue that “. . . attempts such as those by. . . Schilling to try to push the toothpaste back into the tube by

⁴⁷ See *Harvard International Law Journal* 37, no. 2 (1996): 389-409 (Schilling) and 411-448 (Weiler and Haltern).

⁴⁸ Schilling, 403. Schilling refers the reader to J. H. H. Weiler, “The Transformation of Europe,” *Yale Law Journal* 100, no. 8 (June 1991): 2413.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 407.

⁵¹ *Ibid.*, 408.

asserting that the Community is nothing more than an International Organization are self-serving (to the Court) and unhelpful in addressing the real problem of legitimacy.”⁵² In contrast, Weiler and Haltern regard the life of the Communities as the process of the federalising of Europe. Accordingly, it is argued that prior to the *Single European Act* (SEA), the Member States could individually--as the agreement of all State was required--regulate “the legislative expansion of Community jurisdiction/competences/powers”; therefore, placating any fears of alleged activism by the Court. Interestingly, Weiler and Haltern further argue that with the adoption of the *Single European Act* and, thus, majority voting, the Member States no longer enjoy de jure or de facto veto power, which thus limits their individual ability to restrain Community actions. The authors then proceed to argue that the SEA grants the Union--and not the Member States singularly--the authority to determine the boundaries of the Court’s jurisdiction.⁵³ As will be explained below, such reasoning is not indicative of reality, and the present research project will instead, in concurrence with the logic of Schilling, demonstrate that the authority of the ECJ is still very much dependent upon the Member States.

While Weiler and Haltern construct an impressive argument against Schilling’s thesis, they cannot explain away the fact that without a constitution, the European Communities lack *Kompetenz-Kompetenz* and thus an inherent source of legitimacy. As the lack of a specific source of legitimacy underlines the bargaining process assumed by the architect’s compromise model, it is

⁵² Weiler and Haltern, 423.

⁵³ Ibid., 442-448.

necessary to examine the issue raised by Schilling and Weiler and Haltern more thoroughly. However, before attempting to unravel the truth in the claims of Schilling and Weiler and Haltern, and hence whether or not the body of European law issued by the Court to fill in the gaps of the Treaty forms a constitution for the EU, the definition of a constitution must be established.

Constitutions: Some Definitions

Legal scholars have attached two distinctive meanings to the term “constitution”: both a narrow and a broad meaning.⁵⁴ To begin, the narrow meaning is described by Bradley and Ewing as “a document having a special legal sanctity which sets out the framework and the principle functions of the organs of government within the state, and declares the principles by which those organs must operate.”⁵⁵ The American Constitution is often cited as reflective of this meaning of the term. This type of constitution is characteristically written, and among liberal democracies, only Israel and Britain are lacking such a constitution.⁵⁶ In contrast to the narrow meaning, Wheare provides a broad definition in stating:

... it is used to describe the whole system of government of a country, the collection of rules which establish and regulate or govern the government. These rules are partly legal, in the sense that courts of law will recognize and apply them, and partly non-legal or extra-legal, taking the form of usages, understandings, customs, or conventions which

⁵⁴ See, for example, Colin R. Munro, *Studies in Constitutional Law* (London: Butterworths, 1987), 1.

⁵⁵ A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, 11th ed. (London: Longman, 1993), 4.

⁵⁶ Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law*, 7th ed. (London: Penguin Books, 1994), 10.

courts do not recognize as law but which are not less effective in regulating the government than the rules of law strictly so called.⁵⁷

In comparing the Treaties and the subsequent bodies of European law to the foregoing definitions of a constitution, the corpus of European law fails to meet the requirements of either definition. The following section will illustrate the reasons why the Treaties do not constitute a constitution in a narrow sense while the section thereafter will demonstrate that the Treaties also fail as a constitution according to its broad definition.

Constitutions in a Narrow Sense

Initially, the Treaties and subsequent law cannot be regarded as a constitution in the narrow sense, and the purpose of the following section is to justify the current research's reason for arguing such. Usually written, a constitution in this sense refers to the specific document which establishes the rule of law of the state for which the constitution is given effect. De Smith and Brazier note that such written constitutions usually share two features: "They will be the fundamental law of the land; and they will be a kind of higher law."⁵⁸ On the first count, given that its execution is dependent upon the co-operation of national governments and national courts, European law simply cannot be considered the chief law of the land. The Court's self-proclaimed doctrine of supremacy has been highly successful, but such success flows not from an inherent jurisdiction of the ECJ but from the modified preferences of the

⁵⁷ K. C. Wheare, *Modern Constitutions* (Oxford: Oxford University Press, 1966), 1.

⁵⁸ De Smith and Brazier, 4-5.

Member States as will be discussed more thoroughly in later chapters. Furthermore, given the particular inter-governmental character of the European Communities--in which the Member States are the primary actors in drafting and revising the Treaties--the legitimacy of European law is contingent upon the resolve of the separate Member States to maintain it. Secondly, while European law has been largely granted supremacy⁵⁹ it can only be regarded as a higher law in the narrow fields in which it operates, and even then, it is conditional upon the satisfaction of the heads of government who hold the power to amend the Treaties. Furthermore, the Treaties have never been altered to contain the doctrine of supremacy of European law over national law; the Court of Justice itself established the principle.

Moreover, it is difficult to consider the Treaties as a constitution since they were drafted for the purpose of establishing international organisations and thus were not endowed with constitutional authority. As the Communities have been compared to the United States from time to time, such a comparison to illustrate the lack of constitutional authority of the European Treaties is indeed proper. Article VI, Section 2 of the Constitution of the United States establishes the document as the supreme authority on American law.⁶⁰ However, the various Treaties that form the European Communities lack a clear

⁵⁹ As will subsequently be shown, the Member States have not always acquiesced to the concept of supremacy, which is particularly clear with regards to the French *Conseil d'État* and the German *Bundesverfassungsgericht*.

⁶⁰ United States Constitution, Article 6, Section 2 reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

statement of the supreme constitutional authority. Moreover, while the implementation of the Treaties forming the European Communities depended upon the ratification by the “Member States”⁶¹ or “High Contracting Parties”⁶² in a similar manner to the American Constitution’s contingency upon its ratification by state “Conventions,”⁶³ the ratification of the European Treaties were conditional upon the “constitutional requirements”⁶⁴ of the Member States while the ratification of the American Constitution was conditional upon no other constituent constitution.⁶⁵ Hence, the enactment of the European Treaties required the approval of the constituent Members of the Community in accordance to their own constitutions while the establishment of the American Constitution involved the elevation of the document as the supreme law, binding all those states which ratified it for this purpose. Thus, while the authority of the American Constitution is explicit and inherent in the document itself, the authority of the Treaties which form the European Communities is derivative, lacking clear expression in any of the documents.

Similarly, constitutions generally validate themselves by basing their legitimacy upon “the people” of a particular state. According to Whaere, “The people, or a constituent assembly acting on their behalf, has authority to enact a

⁶¹ See, for example, the *Treaty Establishing the European Coal and Steel Community* (ECSC), Article 99.

⁶² See, for example, the *Treaty Establishing the European Economic Community* (EEC), Article 247, *Treaty Establishing the European Atomic Energy Community* (Euratom), Article 224 or the *Treaty on European Union* (TEU), Article R., Section 1.

⁶³ United States Constitution, Article 7.

⁶⁴ See ECSC, Article 99; EEC, Article 247; Euratom, Article 224 and TEU, Article R, Section 1.

⁶⁵ United States Constitution, Article 7.

Constitution.”⁶⁶ This is exactly the manner in which the American Constitution premises its authority.⁶⁷ While such a statement clearly makes for good rhetoric, Whaere stresses this “statement is regarded as no mere flourish. It is accepted as law.”⁶⁸ Hence, constitutions derive their authority in a manner philosophically similar to the theoretical establishment of the social contract: the “people” agree to a particular binding higher law. In stark contrast is the European Treaties’ regard for the people and its source of legitimacy. Without repeating the reasoning above, it can simply be postulated that the source of legitimacy for the Treaties comes not from the “people” but from the Member States themselves according to their separate constitutional provisions. Whereas the contracting parties of the United States Constitution theoretically constitute “the people,” those of the European Treaties are specifically the governments of the Member States. Furthermore, while the concept of European citizenship has become embedded as a fundamental element of European law, such a concept derived not from a higher law but from the inter-governmental co-operation of Member States establishing this idea in Part Two, Article 8 of the amended European Economic Treaty.⁶⁹

⁶⁶ Whaere, 54-55.

⁶⁷ See the Preamble of the United States Constitution.

⁶⁸ Whaere, 55.

⁶⁹ See EC Treaty. (The *Treaty on European Union* formally changed the name of the Community from the “European Economic Community” to “European Community”; hence, the term EC Treaty or simply EC will be used henceforth to refer to the former EEC Treaty after the ratification of the TEU.) Part Two, Article 8, Section 1 reads: “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.” Section 2 continues: “Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.”

Additionally, the nature of the Treaties in relation to “the people” reflects a system basing its legitimacy not directly on the people but aiming to achieve a higher level of integration among the people of the Member States. Specifically, Title I., Article A of the TEU contains the provision: “This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen.”⁷⁰ Hence, the authority for European law does not flow from “the people” (from bottom to top) but from the top downwards, finding its legitimacy in a system imposed by the Member States. As a result, unlike the American Constitution which justifies its legitimacy upon “the people,” the European Treaties find their legitimacy in the limited fields ceded by the Member States, which is dependent upon each of the Member States’ respective constitutions. Likewise, the European Court of Justice depends upon the same source of legitimacy and must operate within its designated jurisdiction or risk repercussions from the Member States. As the foregoing discussion has illustrated some of the reasons why the European Treaties cannot be considered a constitution in the narrow sense, it is now necessary to evaluate the ability of the Treaties to form a constitution in the broad sense.

Constitutions in a Broad Sense

As with the narrow definition of a constitution, neither the Treaties nor the recognised body of European law accurately conforms to the concept of a

⁷⁰ TEU, Title I, Article A.

constitution in broader terms. While the Treaties and subsequent legal acts do represent an “assemblage of laws, institutions and customs,”⁷¹ this source of law lacks the authority of the respective national constitutions of the Member States. Whaere suggests that constitutions generally “claim to possess the authority not of law only but of supreme law,”⁷² giving two reasons for this. First, logic dictates that the constitution must supersede other laws or it would fail to serve the purpose for which it was created--an authoritative source of law--as is the logic of the *Marbury v. Madison*⁷³ case in American law. Second, the constitution is the result of the actions of one which has the authority “to make supreme law.”⁷⁴ However, as has been previously established, the European Communities rest upon an inter-governmental structure, and unless the Member States endow the Communities with constitutional authority, the Court’s jurisdiction will depend precisely on the willingness of the Member States to co-operate with the European institutions. To state this plainly, without transferring *Kompetenz-Kompetenz* to the Communities, the Treaties cannot be transformed into a constitution for Europe. Hence, despite the Court’s consistent inclination to cloak its decisions with the trappings of constitutionalism, the body of European law remains something other than a constitution.

⁷¹ From Bolingbroke, *A Dissertation Upon Parties* (1733), quoted in Wheare, *Modern Constitution*, 2; and Bradley and Ewing, 4.

⁷² Whaere, 56.

⁷³ United States Supreme Court. *William Marbury v. James Madison, Secretary of State of the United States*, *United States Supreme Court Reports*, 1 Cranch (1803): 136-179.

⁷⁴ Whaere, 56-57.

Complicating the debate on the constitutional nature of the Treaties is a steady stream of influential literature which assumes the ECJ to be a constitutional court.⁷⁵ A purely descriptive model of the European Court might lead one to believe that it is, in fact, the constitutional court of the Communities. This description is bounded up in the various roles the Treaties affirm, which are particularly well-sketched by Ole Due:

The Treaties not only define the tasks of the Communities; they also set out the general principles to be respected by the Member States as well as by the Community Institutions; they establish the Institutions and provide them with the powers necessary for performing the tasks of the Communities; they install a complicated system of checks and balances between the Institutions; they define the relations between the Communities, their component States, third countries and international organisations; they regulate the effect of Community acts within the internal legal order of the component State and they authorize the Community Institutions to make rules and take decisions directly binding on the individual subjects of these States.⁷⁶

Due further contends that in these tasks, the Treaties assume greater responsibilities than is customary for agreements establishing and governing international organisations, and thus concludes, that the Treaties fulfil “the same functions as the Constitution of a federal State.”⁷⁷ Additionally, Koen Lenaerts

⁷⁵ Weiler and Haltern make the point by stating, “Literature on this point is endless.” (Weiler and Haltern, 420, note 36) Beyond Stein’s celebrated work (“Lawyers, Judges, and the Making of a Transnational Constitution”), see, for example, Donal Barrington, “The Emergence of a Constitutional Court,” *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh*, ed. James O’Reilly (Dublin: The Round Hall Press, 1992), 251-261; Ole Due, “A Constitutional Court for the European Communities,” *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T. F. O’Higgins*, eds. Deidre Curtin and David O’Keeffe (Dublin: Butterworth, 1992), 3-10; Koen Lenaerts, “Constitutionalism and the Many Faces of Federalism,” *The American Journal of Comparative Law* 38 (1990): 205-263; Federico Mancini, “The Making of a Constitution for Europe,” *Common Market Law Review* 26 (1989): 595-614; and J. Rinze, “The Role of the European Court of Justice as a Federal Constitutional Court” *Public Law* (1993): 426-443.

⁷⁶ Due, 4.

⁷⁷ *Ibid.*

justifies the Court's perceived constitutional character by examining the Court's influence on the horizontal and vertical separation of powers--specifically, the Court's role as arbitrator between firstly, the European institutions, and secondly, the Member States and the Community.⁷⁸ Federico Mancini presents a well-argued and reasonable account of the Court's contribution toward constitutionalising the Treaties, especially with regard to the establishment of the principles of direct effect and supremacy.⁷⁹ Clearly, such descriptions of the "constitutional" character that the Court has embraced are useful in understanding the Court's role in the integration process; however, they fall short of appreciating the narrow base of legitimacy upon which the Court rests as will be addressed below.

Problems of Assuming a European Constitution

The fatal error in assuming that the Treaties have become "constitutionalised" or that the European Court has become a constitutional court for Europe is that it fails to acknowledge the true structure of the European Communities. Whether friend or foe of European integration, it has become fashionable to depict the Court as the centrepiece of an evolving European constitution in much of the literature dealing with the ECJ. Those hostile towards integration charge the Court of wilfully wresting national sovereignty from the hands of the individual Member States while those looking

⁷⁸ Lenaerts, 208-210.

⁷⁹ Mancini, 596-602.

favourably upon the integration process confidently overlook the fact that the Communities remain primarily inter-governmental and carelessly discount the potential problems that can arise from a lack of a constitutional foundation. In both views, the idea that the European Union is marching towards a federal state seems to underlie the respective exuberance or despair for further integration. However, a closer look at the issue reveals a very different story, one that is tremendously important for the current research.

To begin, the European Union is an international organisation; it is not a federal state. The Treaties do lay the foundation for this *community* of states, but they do not form a constitution. Whaere notes that for a constitution to be accepted as the source of law, “. . . it must have been enacted or approved or promulgated by a body recognized as competent to make law.”⁸⁰ While the Member States do possess the power to make law, they did not grant a wholesale transfer of this power to the institutions of the Communities, and thus, they retain the constitutional authority within the EU. The determining factor is that the European Treaties lack the authority of a constitution.

To further examine these issues, it is necessary to distinguish between a community established through a treaty and a state which is founded upon a constitution. To explain, Kelson maintains that when a treaty confers administrative powers regulating foreign relations and “other functions of the contracting states” on an organ of the community created by the contracting

⁸⁰ Whaere, 52.

states, *and* a constitution is “stipulated by that treaty,” *then* such a community will have the character of a state.⁸¹ Kelsen further explains:

By concluding such a treaty and submitting to the federal constitution, the contracting states lose their character as states in the sense of international law. They become so-called component states of the federal state. . . . The centralization in the field of foreign affairs may not be complete; the component states may have some competence left in this respect, for instance, the power to conclude treaties with third states in certain limited fields. . . . But since the component states have this competence in accordance with the federal constitution, the organs of the component states, in concluding treaties within the competence conferred upon them by the federal constitution, may also be considered as indirect organs of the federal state, [or]. . . the federal state acting, in certain respects, through a component state.⁸²

Following Kelsen’s reasoning, if a group of contracting states forms a community, and if the treaty forming that community endows its organs administrative power equivalent to that of the centralised organs of a state, then the community constitutes a federal state. Counter to this supposition, we can infer that if these conditions are not met by the contracting parties to the community, and such a centralised organ is not created, then a federal state is not created. Hence, Kelsen argues that the difference between a federal state and a non-federal state lies in the fact that the federal state is characterised by a greater deal of centralisation. Accepting this, we turn again to Kelsen’s reasoning on such non-federal state structures:

An organized international community is constituted by a treaty which institutes special organs of the international community for the pursuance of the purpose for which the community has been established. This community is an “international” community; it has not the character of a state. The legal order laid down in the constituent treaty has the character of international not of national law if the centralization does

⁸¹ Hans Kelsen, *Principles of International Law*, 2nd ed., rev. and ed. Robert W. Tucker (New York: Holt, Rinehart and Winston: 1967), 260.

⁸² *Ibid.*, 260-261.

not reach that degree which is characteristic of a state. An organized international community is an international organization. In contradistinction to a federal state, it is a confederation of states. German terminology, which distinguishes between *Bundesstaat* ("federal state") and *Staatenbund* ("confederation of states") is more precise.⁸³

Thus, Kelsen distinguishes between a federal state and a confederation of states according to the degree of centralisation,⁸⁴ and this distinction provides a relevant element to the present discussion. Specifically, according to the logic of Kelsen, the Treaties cannot technically be a constitution unless the Communities are, in fact, a federal state. As it is a safe assumption to regard the Communities as being something less than a federal state, the Treaties, therefore, cannot be a constitution. Hence, it is apparent that the Court does not enjoy an independent, inherent source of legitimacy, but one derived from the constitutional legitimacy of the separate Member States, ultimately proving the dependence of the Court upon the Member States for its own authority as will be described in greater detail below.

The Court's Dependence Upon the Member States

It is clear that the Member States (both individually and collectively) have and still exert a determining influence on the Communities. As was alluded to above, not only have the Member States defined the stage upon which the Court acts, but they also indirectly provide legitimacy to the Court.

⁸³ Ibid., 262.

⁸⁴ Kelsen actually warns against assuming the European Communities to be even a partial federation. He does, however, concede that the Communities do represent a high level of centralisation in particular areas; however, due to the limited tools for enforcement of acts of the Communities and lack of its lack of authority in foreign and military affairs, he argues that it cannot be considered a federation. (Kelsen, 263-265)

Federico Mancini points out that in contrast to federal constitutions that “enjoy higher-law status with regard to the laws of the contracting powers,” the Treaties do not claim such authority.⁸⁵ Unlike the German Basic Law which states “Bundesrecht bricht Landesrecht” or the American Constitution that declares “the laws of the United States. . . shall be the supreme laws of the land,” the Treaties are silent on the supremacy of law. Through such cases as *Costa v. ENEL*,⁸⁶ the Court has established the principle of supremacy for Community law⁸⁷ by arguing that without Community law enjoying supremacy over national law, the network of European law would fail to provide the regulation necessary for the success of the internal market and other projects of the Communities. However, to assume that the Court unilaterally created such a device fails to appreciate the dynamics that allowed and even fostered the Court’s creation of the principle of supremacy.⁸⁸

In particular, despite the fact that the Member States have, in fact, “limited their sovereign rights. . . and have thus created a body of law which binds both their nationals and themselves,”⁸⁹ such events should not be interpreted as the result of the Court’s ability to push integration. Rather, the Member States delegated to the Court the responsibility to fill in the gaps of the Treaties which necessitated such Court decisions. According to Mancini, “. . . the recognition of Community pre-eminence was not only an indispensable

⁸⁵ Mancini, 599.

⁸⁶ Case 6/64, *Flamino Costa v. ENEL*, *European Court Reports* (1964): 585-615.

⁸⁷ Mancini, 599.

⁸⁸ This point will be subsequently discussed in greater detail.

⁸⁹ *Costa v. ENEL*, 593.

development, it was also a logical development.”⁹⁰ Unless Member States delegated to the Court the final authority in matters concerning the Communities, the Union could not actually exist.⁹¹ Rather, the European Communities would simply be an international organisation dependent solely upon the whims of the Member States. Joseph Weiler argues that the gradual growth of the Court’s authority

... constitute[s], in a strict sense, a necessary condition for the effective functioning of the Community as a system in which common policies and common rules can have the force of law and be translated into effective action. Without these the Community would be completely at the mercy of the Member States, not merely as regards the adoption of policies but also as regards implementation; moreover the actual obligations undertaken by the Member States when signing the Treaty in 1957 could have remained a dead letter or not much more.⁹²

While it has been argued that the Court has bypassed the Member States in the construction of its “constitution,”⁹³ the neofunctionalist argument that the Member States accept decisions because the Court cleverly masks controversial decisions behind “that technical field law” simply falls apart. Once again, it must be stressed that the Member States delegated this authority to the Court and have not been alarmed enough to reduce its jurisdiction. Richard Plender actually asserts that the Member States purposely left the Treaties ambiguous to allow the Court to fill in the gaps in the manner it felt most fitting. Accordingly, Plender remarks:

⁹⁰ Mancini, 600.

⁹¹ *The Proceedings of the Court of Justice and the Court of First Instance of the European Communities* no. 15/95 (22 to 26 May 1995).

⁹² Joseph Weiler, “Community, Member States and European Integration: Is the Law Relevant?,” *Journal of Common Market Studies* 21 (1982-1983): 45.

⁹³ See, for example, Stein, “The Making of a Transnational Constitution.”

What are we to make of the use of ambiguous language by the negotiators? We certainly cannot conclude that the Member States were blind to the ambiguity. . . . I suggest that we must infer this: that the Member States preferred to avoid resolving their differences by a precise form of words which they might well have used if they had been prepared to press the matter to a vote. . . . They therefore remitted to the European Court the task of resolving the conflict at an unspecified later stage. The language used in the Treaty. . . defines and limits the Court's jurisdiction to resolve a particular dispute. It sets the confines of the Court's power.⁹⁴

Thus, a very accurate description of the Court and the Member States could be drawn as follows: the Member States, who have designated the Court's jurisdiction but have retained the power to alter it, are nonetheless bound by the decisions of the Court as a prerequisite to the realisation of the benefits of the Communities.

Additionally, the legitimacy of the Court is tied up with the Member States' willingness to accept its rulings. According to J. Rinze:

The continued existence of the consent between the Member States and the general readiness to observe common Community rules depends very much on the functioning of the "give and take" process between the Member States, *i.e.* on the general acceptance of the same rules by all Member States. Only in this way can all Member States be sure that certain disadvantages imposed on them by Community law will be compensated by certain advantages granted by Community law. . . . Thus, as in federal states, the observance of the Community rules by all Member States is absolutely crucial for the continued existence of the Community, and there must be an independent and neutral ultimate arbiter.⁹⁵

Naturally, there are flaws in this system, and non-compliance by Member States is certainly a reality. According to Weiler, ". . . one should not be misled to think that no violations, by Member States, Community institutions, or

⁹⁴ Richard Plender, "In praise of Ambiguity," *European Law Review* 8 (1983): 315-316.

⁹⁵ J. Rinze, 432.

individuals, occur. They occur regularly and, as Community activities and impact expand, increasingly.”⁹⁶ Advocate General Carl Otto Lenz reiterates this lack of compliance by noting that in the late 1980s, the European Parliament identified about fifty judgements of the ECJ which Member States have not acted upon. Furthermore, Lenz points out that only about eighty percent of the ECJ’s preliminary rulings are precisely followed by national courts.⁹⁷ Leila Sadat Wexler adds:

Enforcement of the Court’s judgments has been good--but not excellent--by member state governments. . . . The Court itself has not stood by helplessly in the face of member state defiance, holding in *Francovich* that a member state’s failure to implement a directive already sanctioned by the Court in article 169 enforcement proceeding could entitle a person to claim compensation for damages sustained as a result of the member state’s failure to implement. . . [Community law]. In addition, article 171 (2) of the TEU would allow the Court, upon a request by the Commission, to impose pecuniary sanctions on a recalcitrant member state.⁹⁸

Hence, Article 171 (2)⁹⁹ has formally given the Communities a tool through which Member States might be compelled to comply with the laws of the Community--or suffer the consequences of breaking laws. However, the Court does, in fact, occasionally make decisions to which the Member States show little compliance. A classic example--and one which will be described subsequently--is the manner in which the French *Conseil d’État* effectively ignored the rulings of the ECJ until fairly recently. Such a phenomenon

⁹⁶ J. H. H. Weiler, “The Transformation of Europe,” *Yale Law Journal* 100, no. 8 (June 1991): 2464.

⁹⁷ Lenz, 138.

⁹⁸ Leila Sadat Wexler, “The Role of the European Court of Justice on the Way to European Union,” *Europe after Maastricht*, ed. Paul Michael Lützeler (Oxford: Berghahn Books, 1994), 172-173.

⁹⁹ *Treaty on European Union*, Article 171 (2).

underscores the complex relationship between the Member States and the Court: the Court is dependent upon the Member States for legitimacy, but the Member States are also dependent upon the Court for the continued integration of Europe, and the benefits this brings.

Conclusion

In short, the Court and the Member States are inextricably linked together in the process of European integration. Ulrich Everling explains:

It is undisputed that the Community's institutions are only competent to act as far as sovereign powers are given to them by the Treaty. This limit is not only to be respected by the political institutions but also by the Court when it decides about the validity of acts of the institutions or interprets the Treaty. But the sum of the numerous and broad powers transferred to the Community is more than a mere patchwork carpet. The Court is an independent body pursuing political and economic aims defined by the Treaty. The competencies must be coherently and teleologically interpreted in order to enable the institutions to accomplish the aims of the Treaty.¹⁰⁰

As has been argued, based upon the Court's position in the decisional process as defined by the Member States in the Treaties, the Court must be identified as an actor. Additionally, as the founders of the Communities, the Member States must be considered primary actors in the model. Moreover, the absence of a true constitution and the legitimacy gap this inevitably brings to the Court demands that the Member States be included in any model of European integration. Finally, given this complex relationship between the Member States

¹⁰⁰ Ulrich Everling, "The European Court of Justice and Interpretation of the Treaty," *The Developing Role of the European Court of Justice* (London: European Policy Forum and Frankfurter Institut, 1995), 52.

and the Court, any model of legal integration should place special interest on this theatre of judicial-political interaction. Moreover, such a model of integration should be able to incorporate and explain non-compliance as well as compliance to Court decisions as the idea of modified preferences does in the architect's compromise model. These modified preferences and the remaining assumptions will be addressed in the following chapter, completing the theoretical construction of the model in preparation for its testing against the acceptance of the doctrine of supremacy, particularly in the United Kingdom and Germany, which will comprise the remainder of this research.

Chapter IV

The Architect's Compromise Model and its Remaining Assumptions

In the preceding chapter, the first assumption of the architect's compromise was explained as well as the related issue of constitutionalism and the Treaties. The debate concerning constitutionalism received particular attention, owing to its extreme importance in the logic behind the architect's compromise model. This chapter will address the remaining assumptions of the architect's compromise model in detail. First, the rationality of the Court and the Member States--as the primary actors in the model--will be demonstrated. Secondly, the assumption of the Court as a strategic actor will be justified with a short discussion of the common perception of the Court practising periods of activism and self-restraint. Third, the idea of modified preferences will be addressed. Although the architect's compromise model makes two separate assumptions concerning modified preferences (the Court usually conforms to modified preferences when making decisions and the Member States can be assumed to accept Court decisions *when* they conform to modified preferences), the discussion will address the assumptions together since they are so closely related. The purpose of this chapter is thus to justify the claims that have been made previously concerning the architect's compromise model of European integration.

Rationality of the Actors

Having already established that the Court and the Member States are recognised as the primary actors in the architect's compromise model, the rationality of the actors will be examined. As has already been argued,¹ the term "rationality" is laden with controversy; however, defined as purposeful activity in pursuit of one's goals, rationality faces no particular problems in the present research. Therefore, within the realm of the activities of the European Court of Justice, this study will argue that rationality--as defined by purposeful behaviour--predominates. Thus, the following section will initially demonstrate the issue of rationality as evident by the Court's teleological approach; subsequently, the rationality of the Member States will be discussed, focusing on their purposeful behaviour.

The ECJ: A Rational Actor with a Teleological Approach

To begin, the actions of the European Court of Justice are reflective of rational behaviour. Specifically, in the case of the Court, purposeful behaviour involves behaviour which further enhances and realises the aims of European integration as outlined in the Treaties. According to Ulrich Everling, "Consequently, when the Court is in the process of reaching a decision it engages in a work of construction which, in a certain sense, reflects the entire

¹ See Chapter I.

process of European integration in which it is embedded.”² It is widely held³ that the Court relies greatly on a teleological approach⁴ in which the ECJ interprets the Treaties in a purposeful manner as to strengthen European law. Through adopting such an approach, the Court’s preference for further integration becomes apparent. It is on this point that we turn to a fuller discussion of the teleological approach and what it reveals concerning the actions of the Court. Such an examination of teleology will illustrate the manner in which the Court engages in purposeful behaviour.

In a teleological approach, a certain action is preferred when it promotes a particular end.⁵ According to Brown and Kennedy:

The term teleological is applied to an interpretation which is based upon the purpose or object of the text facing the judge. This approach, which is increasingly favoured by the Court, is peculiarly appropriate in Community law where, as we have seen, the Treaties provide mainly a broad programme or design rather than a detailed blue-print.⁶

² Ulrich Everling, “The Court of Justice as a Decisionmaking Authority,” *Michigan Law Review* 82, nos. 5 and 6 (April/May 1984): 1307.

³ Much of the literature cited in this section concerns teleology, especially, for example, J. Mertens de Wilmars, “Reflexions sur les Méthodes d’Interprétation de la Cour de Justice des Communautés Européennes,” *Cahiers de Droit Européen* (1986): 5-20; and Bastiaan van der Esch, “The Principles of Interpretation Applied by the Court of Justice of the European Communities and their Relevance for the Scope of the EEC Competition Rules,” *Fordham International Law Journal* 15, no. 4 (1991-1992): 366-397.

⁴ Nancy (Ann) Davis, accepting the reasoning of Rawls, recognises a division between moral theories into teleology and deontology. A deontological approach suggests certain actions are immoral in themselves and cannot be justified regardless of the ends. In contrast, teleology suggests that particular acts should be regarded as moral or immoral, or right or wrong, based on the ends they achieve. Nancy (Ann) Davis, “Contemporary deontology,” *A Companion to Ethics*, ed. Peter Singer (Oxford: Blackwell Publishers, 1991), 205-206.

⁵ See John N. Adams and Roger Brownsword, *Understanding Law* (London: Fontana Press, 1992), 36-40. The present research recognises the Court’s use of the teleological approach in many circumstances but makes no comment on the morality of such approach, especially regarding its association with utilitarianism.

⁶ L. Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities*, 4th ed. (London: Sweet and Maxwell, 1994), 316-317.

Ulrich Everling addresses teleology and the Court as follows:

... the Court of Justice. ... must draw guidance from the specific tasks defined in the Treaty and the results, which must be pursued and expanded upon, hitherto achieve on the basis of those tasks. This involves primarily securing the Common Market by applying the prohibition of discrimination and restrictions, by guaranteeing the conditions of competition, by ensuring a common position toward other countries and by protecting persons affected by unlawful acts. The Common Market constitutes the starting point for the entire integration process and all attempts at more far-reaching economic and political progress stem from it. Running like a red thread through the whole of the Court's case law is the idea that this core of the Community must remain sacrosanct⁷

Thus, from a teleological approach, the Court is bound by the Treaties to accomplish their aims. According to Article 164, "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."⁸ Therefore, the Court is bound to bring about the Treaties' objectives in accordance with the rule of law. Moreover, the Court, as an institution of the European Communities, is thus bound "to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."⁹ The fact that the Court employs a teleological approach which attempts to bring to fruition the aims of the Treaties confirms the Court's rationality under the criteria of purposeful behaviour. Lord Slynn of Hadley writes that

⁷ Everling, "Court of Justice and Decisionmaking Authority," 1305.

⁸ EEC, Article 164.

⁹ TEU, Article 2.

“‘teleological’ is synonymous with ‘purposive,’” and the “Court may, in application of a teleological interpretation, go so far as to override the clear, ambiguous words of a legal text.”¹⁰ The idea of the Court employing a teleological approach has also been verified fairly recently by Mertens de Wilmars, a former President of the Court. While recognising different methods of interpretation, Mertens pays particular attention to teleology given the framework established by the Treaties for the completion of a specific goal.¹¹

The case law of the Court contains prime examples of teleological interpretations. One such case is *Costa v. ENEL*¹² which established the doctrine of supremacy of European law. However, it was virtually axiomatic that the Court would rule in favour supremacy when one considers that the Court was established under the Treaty to ensure that the laws are observed. Without recognising supremacy, the Member States would not be bound to any of the provisions to which they had signed, and the Communities would be no more than a traditional international organisation without any mechanism for enforcement, with no ultimate legal authority. Instead, adopting a teleological approach, the Court reasoned for the fulfilment of the objectives in the Preamble and other parts of the Treaty, a doctrine of supremacy must be embraced and, accordingly, founded this principle in *Costa* and strengthened it in its further rulings.

¹⁰ Lord Slynn of Hadley, “They Call it ‘Teleological,’” *The Denning Law Journal* (1994): 226.

¹¹ See J. Merten de Wilmars, 5-20.

¹² Case 6/64, *Flamino Costa v. ENEL*, *European Court Reports* (1964): 585-615.

Recalling that, for the purposes of the architect's compromise model, purposeful activity was established as the criteria for rational behaviour, the Court's use of a teleological approach verifies the rationality assumption. In addition, the consistency with which the Court strives to strengthen EC law further suggests the Court's rationality. According to Giuseppe Tesaro,

There is no doubt that one of the aims pursued is to ensure the rationality and harmony of the system. And the endeavours being made by the Court of Justice to that end seem at least to be consistent, in so far as they are directed towards every aspect of the system, in particular the preliminary ruling procedure, not only in itself but also in relation to the other procedures relevant to judicial review. That applies above all where the aim pursued is that of extending judicial protection of rights and making it ever more effective.¹³

Thus, as a rational actor, motivated by purposeful behaviour, the Court seeks to act in a consistent manner. Ulrich Everling notes:

The procedural elements relevant to legitimation are, therefore, particularly important. According to Max Weber, institutions legitimate themselves through their rationalism, their tradition and their charisma.¹⁷ For courts, procedural principles such as publicity and transparency in the passing of judgments, the neutrality and independence of the judges, and the equal treatment and the opportunity for the parties concerned to be heard are paramount. Of central significance is the plausibility of the reasoning in the decision made, the persuasive power that they radiate and the answer that they give to the arguments of the parties. These are particularly important for the Court of Justice.¹⁴

¹⁷ M. Weber, *Wirtschaft und Gesellschaft*, Studienausgabe Köln 1964, p. 159.

¹³ Giuseppe Tesaro, "The Effectiveness of Judicial Protection and Cooperation Between the Court of Justice and the National Courts," *Festskrift til Ole Due* (Copenhagen: G.E.C. Gads Forlag, 1994), 373.

¹⁴ Ulrich Everling, "Reflections on the Reasonings in the Judgments of the Court of Justice of the European Communities," *Festskrift til Ole Due* (Copenhagen: G. E. C. Gads Forlags, 1994), 58. (Footnote included)

In sum, the Court must act in a consistent manner to maintain its legitimacy as engaging in erratic and arbitrary behaviour would most assuredly undermine its authority. Moreover, the fact that the Court undertakes such a consistent approach to its decision-making responsibility verifies the assumption of rationality. The Court's rational approach will be further described in a related manner during the subsequent discussion of the Court as a strategic actor; however, it is first necessary to justify the rationality assumption for the Member States.

Rationality and the Member States

Having established that the Court of Justice represents a rational actor based on its teleological approach to the Treaties, its consistency and its general commitment to purposeful activity, we now turn to the other primary actors in the architect's compromise model: the Member States. As with the Court, the Member States exhibit rational behaviour based on their display of purposeful activity. While it is virtually impossible to ascertain all the individual goals and ambitions which motivated each of the Member States to join the Communities and indeed the policy makers within them, it can be reasonably assumed that security and economic interests were particularly important during the establishment and continuance of the Communities. As has been previously discussed,¹⁵ the Community of Six grew out of the initial agreement for joint supervision of the coal and steel making industries of Germany and France. In

¹⁵ See Chapter I.

forming the European Coal and Steel Community, Belgium, France, Germany, Italy, Luxembourg and the Netherlands deliberately ceded an element of their respective sovereignty with the intent of receiving greater security (or at least to lessen the threat of another war). Believing they could achieve similar successes in the atomic energy sector and at a larger economic level, the Member States purposely established Euratom and the EEC. Whether or not the formation of these Communities represents the optimal solution to the problems facing Europe after the Second World War is a moot point with regard to the present definition of rationality. Instead, having adopted "purposeful behaviour" as the criteria, the formation of the Communities suggests the rationality of the Member States to the extent that they did, in fact, display purposeful behaviour in the establishment of the Communities.

In addition to the founding of the Communities, the periodic enlargements are the result of purposeful behaviour by the non-founding Member States. Without recognising greater benefits within the Communities versus outside, states would have no motivation for joining (as was the case in Switzerland and Norway). The continued expansion and the expression of interest by a number of Member States suggests that many states recognise net benefits to membership. States which have joined after the Communities' initial establishment also reflect purposeful behaviour in ceding an element of their sovereignty for membership. For example, in the case of the United Kingdom, the Government calculated that the benefits of membership were greater than the costs. In the Command Paper of July 1971, it was reported that "... Her Majesty's Government are convinced that our country will be more secure, our

ability to maintain peace and promote the development of the world greater, our economy stronger, and our industries and people more prosperous, if we join the European Communities than if we remain outside them.”¹⁶ According to such logic, membership in the Communities was worth a certain loss of sovereignty, and despite occasional (although increasingly and more forceful) arguments against the Communities, the United Kingdom continues to value membership over non-membership. According to the criteria for rationality, Britain meets such an assumption since it has purposely joined the Communities and continues to remain within the Communities. Likewise, we can assume the other Member States to be rational actors as they too have purposely joined the Community for various benefits (such as access to a larger market and increased security) and continue to maintain their membership despite any short-term disagreements.¹⁷

The Court as a Strategic Actor

The architect’s compromise model next assumes that the Court is a strategic actor. Specifically, we recognise the Court as holding the goal of a successful European Union. Naturally, the Court is concerned with upholding the rule of law; however, in the earlier discussion of teleology, it was determined that the Court does, in fact, make its decisions in a manner to best realise the aims of the Treaties. Hence, the Court has the mandate to pursue

¹⁶ Cmnd. 4715, *The United Kingdom and the European Communities*, July 1971, 2.

¹⁷ This acceptance of short-term sacrifices for the overall benefits of membership will subsequently be discussed in full detail with regards to modified preferences.

integration as is outlined in the Treaties. According to Henry Schermers, "It is to the credit of the Court that it always protected the Community interest, even against the wishes of the Member States, and that it did not accept a right of the collective Members--or the majority of them--to give an interpretation of the Community Treaty, but rather adhered to the original intentions."¹⁸ A formidable literature supports the idea of a Court steadily pursuing the goal of European integration. However, the danger of both overestimating and underestimating the authority of the Court in this area is real, and schools of thought on either spectrum have clouded the issue. While a thorough study of the debate over judicial activism and the Court is beyond the scope of this research, a brief sketch of this issue nonetheless illustrates the degree to which the Court functions as a strategic actor.

The Court has been criticised for pursuing integration through its teleological approach, and at the extreme, the Court has been accused of judicial activism. Gavin Smith argues that the Court's "judgements have not infrequently crossed the dividing line between interpreting and applying the law and actually creating it. In particular, there is concern that the Court has been too ready to depart from the plain wording of the texts in its desire to promote European integration."¹⁹ Echoing the same concerns, Sir Patrick Neill has commented:

¹⁸ Henry G. Schermers, "The Role of the European Court of Justice in the Free Movement of Goods," *Courts and Free Markets: Perspectives from the United States and Europe*, vol. 1, eds. Terrance Sandalow and Eric Stein (Oxford: Clarendon Press, 1982), 222-223.

¹⁹ Gavin Smith, *The European Court of Justice: Judges or Policy Makers?* (London: The Bruges Group, 1990), 9.

The Treaty texts and directives agreed between the Member States may at any time be given by the Court a meaning and impetus that may not have been contemplated by the negotiators. The national law of Member States is subject to annulment, not only in the light of the Court's interpretation of these texts, but also pursuant to general principles of law developed by the Court on its own initiative (e.g. the doctrine of proportionality). Whatever the views of Member States--and frequently they strongly oppose the ruling ultimately adopted by the Court--the decisions of the Court stand unchallenged and can only be altered by Treaty amendment. Even in that regard. . . the Court has called in question the power of Member States to make any amendment which alters the central role of the Court as guardian of "the basic constitutional charter, the Treaty."²⁰

After sketching the impact of early Court decisions prior to the UK's accession, Neill focuses on key decisions affecting European integration following the advent of British membership. In doing so, Neill criticises the reasoning and the "activism" of the Court and finally concludes with a hostile analysis of the Court. Specifically, Neill accuses the ECJ of being an unorthodox court with a mission for pushing forward European integration.²¹

In response to Neill's criticism, Lord Howe effectively counters Neill's arguments. To begin, Howe points out that the formative decisions of the Court's first few decades were fundamental to establishing a European rule of law since the Treaties were grossly incomplete in prescribing the precise legal environment that the Communities would assume. Thus, Howe argues that the ECJ could not simply interpret the Treaties, and instead, it was motivated to establish working procedures in the absence of a "pre-existing legal system to

²⁰ Patrick Neill, *The European Court of Justice: A Case Study in Judicial Activism* (London: European Policy Forum and Frankfurter Institut: August 1995), 1.

²¹ *Ibid.*, 47-48.

work with.”²² Moreover, Howe argues that courts in general have engaged in establishing law by their successive rulings in case law and draws particular attention to “judge-made law” in Britain as a classic example of the very activity for which Neill condemns the ECJ. In sum, Howe appears to suggest that Neill regards the Court as having a rather static mandate: to refrain from ever veering from a strict interpretation of the Treaties’ text. However, Howe is correct to argue that such a restraint on the actions of the Court is virtually impossible--especially given the Court’s role of filling in the gaps of the Treaties.²³ Furthermore, recognising the Court’s necessary use of a teleological approach, the criticisms of Neill lose their potency.

In addition to Neill, Trevor Hartley accuses the Court of engaging in judicial activism, systematically attacking several doctrines established by the ECJ. To begin, Hartley accuses the Court of activism in its adoption of direct effect given that it is conspicuously absent from the Treaties. Moreover, Hartley suggests that the Court’s judgement in *Van Duyn v. Home Office*²⁴ violates Article 189 since the case suggests the direct effect of directives despite the freedom for implementation granted to the Member States by the Treaty. Next, Hartley accuses the Court of overstepping its jurisdiction in giving preliminary rulings on international agreements, citing *Haegeman*,²⁵ *SPI*,²⁶

²² The Rt. Hon. The Lord Howe of Aberavon, “Euro-Justice: Yes or No?” *European Law Review* 21 (June 1996): 191.

²³ *Ibid.*, 187-198.

²⁴ Case 41/74, *Yvonne van Duyn v. Home Office*, *European Court Reports* (1974): 1337.

²⁵ Case 181/73, *R. & V. Haegeman v. Belgian State*, *European Court Reports* (1974): 449-474. In *Haegeman*, the Court held that Article 177 granted the Court jurisdiction over international agreements.

²⁶ Joined Cases 267 to 269/81, *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)*, *European Court*

Sevince,²⁷ *Foto-Frost*²⁸ and *Busseni*²⁹ as evidence. Finally, Hartley attacks the Court over its rulings on annulment action. For example, Hartley accuses the Court of extending the right--against the text of the Treaty--to bring annulment actions to the European Parliament, citing the *Chernobyl* case.³⁰

However, perhaps the most outspoken critic of the Court for its engagement in "judicial activism" is Hjalte Rasmussen. According to Rasmussen,

In defiance of much European tradition, the European Court engaged in a teleological, pro-Community crusade, the banner of which featured a deep involvement which led it to give primacy to pro-integrationist public policies over competing ones that were often, even outside the ring of losing litigants, considered as meriting some protection.³¹

Rasmussen suggests at least five examples by which the Court has engaged in judicial activism. To begin, Rasmussen argues that the Court extended the prohibition of "quantitative restrictions and measures with equivalent effect" of Article 30 far beyond the spirit of the Treaty. Next, Rasmussen suggests that

Reports (1983): 801-845. In *SPI*, the Court held that it had jurisdiction to interpret GATT.

²⁷ Case C-192/89, *S. Z. Servince v. Staatssecretaris van Justitie*, *European Court Reports* (1990): I-3461-I-3507. In *Sevince*, the Court ruled that in international institutions established with non-Member States, the rules of Article 177 also apply.

²⁸ Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, *European Court Reports* (1987): 4199-4235. In *Foto-Frost*, the Court ruled that it had the sole authority to declare a Community act invalid.

²⁹ Case C-221/88, *European Coal and Steel Community v. Acciaierie e Ferriere Busseni SpA (in Liquidation)*, *European Court Reports* (1990): I-495-I-530. In *Busseni*, the Court determined that the measures adopted under the ECSC Treaty fall under the jurisdiction of the Court.

³⁰ Case C-70/88, *European Parliament v. Council of the European Communities*, *European Court Reports* (1990): I-2041-I-2075. Trevor C. Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union," *The Law Quarterly Review* 112 (January 1996): 95-109, especially 95-102.

³¹ Hjalte Rasmussen (1988), "Between Self-Restraint and Activism: A Judicial Policy for the European Court," *European Law Review* 13 (1988): 37.

the Court interpreted the Treaty's silence on the issue of supremacy to indicate that Community laws thus have supremacy over any national laws. Furthermore, in contrast to the Treaties which recognise direct applicability of Community law to the Member States only as the exception, the Court firmly established direct effect as a cornerstone of European law in *Van Gend en Loos* as was mentioned previously.³² In addition, Rasmussen points out that the Court simply invented the principle of pre-emption. Finally, Rasmussen suggests that "the Court even assumed responsibility for rewriting the text [of the Treaty] in question." Specifically, Rasmussen argues that the Court, in the face of strong French opposition, interpreted the Euratom Treaty in light of the EEC Treaty, thereby suggesting the creation of a "common market" for the atomic industry when such was simply not suggested in the Euratom Treaty.³³

However, the Court is not without its defenders in these accusations of activism. While admiring its scholarship, Mauro Cappelletti takes exception to Rasmussen's activist thesis,³⁴ suggesting that "it is based on some wrong and often biased premises."³⁵ Additionally, Takis Tridimas argues that "criticism against the Court on grounds of judicial activism tends to be based on a selective analysis. . . . What is more, judicial activism is a term not easily susceptible to objective determination. Whether a decision is active or not

³² Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, *European Court Reports* (1963): 1-30.

³³ Hjalte Rasmussen, "The Court of Justice of the European Communities and the Process of Integration," *Fédéralisme et Cours Suprêmes/Federalism and Supreme Courts*, Edmond Orban et al. (Montreal: Les Presses de l'Université de Montréal, 1991), 205-206.

³⁴ Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Dordrecht: Nijhoff, 1986).

³⁵ Mauro Cappelletti, "Is the European Court of Justice 'Running Wild'?", *European Law Review* 12 (1987): 3.

depends on one's standpoint."³⁶ Tridimas further argues that periods of apparent activism or self-restraint by the Court cannot be interpreted as conscious actions by the Court. Instead, they simply represent either the areas in which the Court must fill in the gaps or areas in which the Community has reached a degree of maturity and requires less judicial intervention.³⁷

The fact that the Court has been the subject of such intense criticism simply underlines the important role the Court has assumed in the process of integration. Not wishing to become drawn into the debate, the present research simply recognises that the Court does play the part of a strategic actor, employing a teleological approach to decisions. We recognise that the Court does hold particular preferences, to the extent that a teleological interpretation finds its goals in the Treaties, and that the Court follows these preferences to the extent that cases lend themselves to the process of integration. However, the scope for deepening integration is quite limited in most cases, and thus, the Court's action can be more easily described as conforming to deciding cases on the rule of law. In other words, the Court does pursue further integration through its teleological approach, but a great number of cases do not lend themselves to providing the Court with an opportunity to further integration to any great extent. These case, as can be recalled from Chapter II, can also be accommodated by the architect's compromise.³⁸

³⁶ Takis Tridimas, "The Court of Justice an Judicial Activism," *European Law Review* 21 (June 1996), 200.

³⁷ Ibid., 200-202.

³⁸ Namely, these cases can be accommodated by a_2 , which expresses a Court action which leads neither to integration or disintegration. See the appendix following Chapter VIII for a full clarification.

The ECJ: Chronology of a Strategic Actor

A historical sketch of the Court perhaps best illustrates the manoeuvres of the Court as a strategic actor. Gerhard Bebr summarises the early strategic actions of the Court:

In its initial jurisprudence, the Court sought first of all to lay down the foundation of the Community legal order. This is reflected in the leading cases establishing the fundamental principles of direct effect and supremacy of Community rules. . . . In the following stage of the jurisprudential development--which is no less important--the Court appeared anxious, next to preserving the *acquis communautaire*, to consolidate and further develop the Community system of judicial protection.³⁹

Weiler identifies the adoption of four particular doctrines which represent steps in the Court's assertion of its authority: direct effect, supremacy, implied powers and human rights.⁴⁰ The present research also adopts these four landmarks in European legal integration as illustrative of the Court's manoeuvres as a strategic actor.

To begin, the Court's adoption of the doctrine of direct effect represents an early strategic act by the Court to solidify its authority. The doctrine of direct effect is summarised well by Weiler: "Community legal norms that are clear, precise, and self-sufficient (not requiring further legislative measures by the authorities of the Community or the Member States) must be regarded as

³⁹ Gerhard Bebr, "Court of Justice: Judicial Protection and the Rule of Law," *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers*, vol. II, eds. Deirdre Curtin and Ton Heukels (Dordrecht: Martinus Nijhoff, 1994), 304.

⁴⁰ J. H. H. Weiler, "The Transformation of Europe," *Yale Law Journal* 100, no. 8 (June 1991): 2413-2419.

the law of the land in the sphere of the application of Community law.”⁴¹ When a provision has direct effect, it essentially means that the rights of individuals in question must be upheld in national courts. While issues of direct effect typically involve a private citizen wishing to invoke Community law against a public authority, questions of direct effect can also involve cases brought by individuals against other private individuals, or cases brought by national governments against private individuals. By embracing such a teleological approach to the Treaties, the Court has systematically strengthened the legal integrity of the Community.

As with the establishment of direct effect, the adoption of the doctrine of supremacy illustrates the Court’s attempt to strengthen the integrity and authority of European law. In *Costa v. ENEL*, the Court reasoned:

The precedence of Community law is confirmed by Article 189, whereby a regulation ‘shall be binding’ and ‘directly applicable in all Member States’. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.⁴²

Once again, employing a teleological approach, it is widely recognised that the Court consciously expanded its jurisdiction beyond the scope of the explicit

⁴¹ Ibid., 2413.

⁴² *Costa v. ENEL* (ECR), 585.

wording of the Treaty;⁴³ however, this action of the Court must be evaluated in the overall context of European law. Clearly, without the existence of a doctrine of supremacy, the body of European law would be unenforceable--relying on the goodwill of the Member States instead. Hence, the Communities would not suffer from simply a free-rider problem; instead, they would undoubtedly suffer from large-scale non-compliance by various Member States, which in turn would eradicate any benefits of community. Thus, the Court's formulation of the doctrine of supremacy functioned to enhance the effectiveness of the Communities by ensuring that Member States give priority to Community law when it conflicts with national law.

Weiler further discusses the Court's adoption of implied powers. To explain, Weiler traces the origins of implied powers to the 1971 case *Commission of the European Communities v. Council of the European Communities*⁴⁴ in which the Court decided that by granting internal competence, the Treaties also granted the Communities the power to make international treaties, which are binding on the Member States. According to Weiler, "The significance of this ruling goes beyond the issue of treaty-making power. With this decision. . . the European Court added another rung in its constitutional ladder: powers would be implied in favor of the Community where they were necessary to serve legitimate ends pursued by it."⁴⁵ By formulating such

⁴³ See Paul Craig and Gráinne de Búrca, *EC Law: Text, Cases and Materials* (Oxford: Clarendon Press, 1995), 245.

⁴⁴ Case 22/70, *Commission of the European Communities v. Council of the European Communities*, *European Court Reports* (1971): 263-295.

⁴⁵ Weiler, 2416.

authority, the Court further consolidated and strengthened the powers of the Community.

Finally, the adoption of a doctrine of human rights represents an important step in the constitutional role of the Court. Although the Treaties contain no provisions for human rights, the Court began, in a series of cases from 1969, to review cases with respect to the shared constitutional principles among the Member States with regard to human rights.⁴⁶ Coppel and O'Neill demonstrate that the Court has used the concept of human rights to extend its jurisdiction in two manners: offensively and defensively. In terms of a defensive use of human rights, the Court began to develop the doctrine in response to German and Italian concerns that the Communities would subvert the fundamental rights identified at a national level with the increase of Community competence. In contrast to the defensive use of human rights, which refers only to Community acts, the Court uses fundamental rights offensively through applying them to the Member States. Furthermore, Coppel and O'Neill maintain that the Court has been more concerned with the expansion of legal integration rather than with the substantial development of human rights and has thus used the guise of human rights instrumentally.

⁴⁶ Ibid. 2417.

The Court as a Strategic Actor: Some Conclusions

Above all, the Court must operate in a manner as to retain its legitimacy. Sir Patrick Neill explains that “. . . the Court should move with caution because it is very important that it should attract to itself legitimacy for what it does. By ‘legitimacy’ I mean in this context that the Court should be seen to be acting as a judiciary and not as a legislature.”⁴⁷ In a sense, the actions of the Court represent a balancing act between its teleological approach and the preferences of the Member States. It would be denying reality to believe the argument that law constitutes a sacred field which commands authority for its own sake. Regardless of the “rule of law,” the political reality remains that the Member States maintain the authority to alter the Communities or even abandon the entire project. Therefore, the Court must be cognisant of the fact that the Member States must continue to recognise the independence and authority of the Court, and to maintain this delicate relationship, the Court must assuredly take into the account the long-term goals of the Member States when making decisions. Such considerations by the Court to forego its unbridled preferences logically lead to the concept of modified preferences, which will be discussed below.

⁴⁷ Sir Patrick Neill, “The Constitutional Role of the European Court of Justice,” *The Developing Role of the European Court of Justice* (London: European Policy Forum and Frankfurter Institut, 1995), 46.

Modified Preferences

One of the central ideas of the architect's compromise is that the Court and the Member States forego their unbridled preferences for greater ultimate benefits. Thus, in addition to assuming the Court to be a strategic actor, the architect's compromise model recognises the important role of modified preferences in this theatre of European integration. While the idea of modified preferences has already been described in cursory terms, a more detailed explanation of the concept will now be undertaken. The concept of modified preferences is based on the notion that Member States must forego short-term national preferences in the expectation of greater benefits as a result of Community membership. According to the architect's compromise model, it is these modified preferences which characterise both Court decisions and acceptance of such decisions by the Member States. As has been suggested previously in the discussion of the Court as a strategic actor, modified preferences imply that the Court necessarily must consider its decisions in light of the (modified) preferences of the Member States. Likewise, the Member States can be expected to accept Court decisions as long *as they conform to modified preferences*.

The European Court of Justice does not operate in a vacuum. While the Treaties confer powers upon the Court to make its own judgements, the Court must remain cognisant of the fact that the Member States ultimately comprise the Union. Ulrich Everling contributes the following concerning the delicate balance the Court must strike:

The Court cannot ignore that in the final analysis the Member States sustain the Community as its founders and exercise decisive responsibility through the Council; it must also consider that they independently discharge functions of their own for the common good and in order to secure their national existence. On the other hand, however, the Member States are incorporated into the Community and are subject to Community law and must accept that restrictions are placed on them by the case law, including, where appropriate, decisions in Treaty-infringement cases.⁴⁸

Although its case law indicates the Court is more likely to apply a teleological approach as has already been explained in detail, modified preferences determine the limits of the Court's rulings. Perhaps the most obvious examples are *Foglia v. Novello Nos. 1 and 2*.⁴⁹

In the cases, the French corporation Novello agreed to purchase wine from the Italian corporation Foglia, and in the contract, Novello refused any charges levied by either Italy or France which were contrary to Community law. In response to a French tax, Novello refused to pay, and Foglia sued Novello in the Italian Courts. In its first decision, the Court decided that the matter was not an issue of European law, and instead was a matter of national concern. In contrast to the reasoning of those painting the Court as an activist institution, the ECJ issued its decision with marked caution; in addition, the Court exhibited the same cautious behaviour in the second Foglia case. Instead of extending its jurisdiction through issuing a decision in the case, the Court refused to rule on the case, arguing it was a matter for the national courts. Such a view was precisely the position advocated by the French government in *Foglia v. Novello*

⁴⁸ Ulrich Everling, "Court of Justice and Decisionmaking Authority," 1306.

⁴⁹ See Case 104/79, *Pasquale Foglia v. Mariella Novello (No. 1)*, *Common Market Law Reports* 1 (1981): 45-61; and Case 244/80, *Pasquale Foglia v. Mariella Novello (No. 2)*, *Common Market Law Reports* 1 (1982): 585-627.

No. 2. It would be too convenient to assume that the Court simply adopted the French government's view. Furthermore, such an explanation is simplistic at best and cannot be supported by the history of Court decisions in which the Court has at times vigorously opposed the Member States. However, some factor did exist to cause the Court to restrain its decision. Accordingly, it could be argued that as the Court had already determined the rudimentary principles of the European legal system; it--at the time of the *Foglia* cases--had to restrain its actions in light of the Member States.

In contrast, in the case of *Defrenne v. SABENA*,⁵⁰ the Court compromised the principle of the law in its agreement with Ireland and Britain that the concept of equal pay for equal work should not be enforced retrospectively. Additionally, the Court's ruling in *Keck*⁵¹ represents another retreat by the Court from an integrationist stance. In *Keck*, the Court was aware that the French legislation in question did, in fact, restrict businesses from using a particular sales promotion, which would suggest that the measure was in violation of Community law. However, the Court cautiously ruled that the French legislation fell out of the scope of Article 30⁵² since the legislation applied equally to both domestic and foreign products. Moreover, in a study of

⁵⁰ Case 43/75, *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, *European Court Report* (1976): 455-493.

⁵¹ Cases C-267-268/91, *Bernard Keck and Daniel Mithouard*, *Common Market Law Reports* 1 (1995): 101-125.

⁵² Article 30 (EEC) reads: "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States."

the case law of the jurisdiction of the Court, Elizabeth Freeman identifies several other cases in which the Court clearly adopts a cautious approach.⁵³

From the cases mentioned above, there appears to be a distinction between those which actively deepen integration and those which advocate a more cautious stance. As has been previously established, the concept of modified preferences explains the dichotomy between “activism” and “restraint” as simply reflecting the Court’s mandate to fulfil the aims of the Treaties balanced against the necessity to limit its actions within the boundaries set by the Member States. Such boundaries exist in a formal extent, as in the actual wording of the Treaties, as well as on an informal level, such as the political climate of the Communities at the time of the decision.

The Member States and Modified Preferences

Just as modified preferences affect the scope of the decisions of the Court, they also affect the willingness of the Member States to accept Court rulings. It is almost axiomatic to state that actors wish to maximise their returns, and likewise, states wish to pursue the actions which promise the greatest payoffs. Therefore, it could be assumed that Member States which are confronted with unfavourable judgements are faced with the temptation to either ignore the judgement outright or to at least acknowledge the ruling but

⁵³ Elizabeth Freeman, “Decisions of the European Court of Justice relating to the Jurisdiction of the Court,” *Yearbook of European Law*, ed. F. G. Jacobs 1 (1981), 407-416.

remain less than eager to abide by it. However, despite a degree of non-compliance,⁵⁴ the Member States largely abide by the rulings of Luxembourg. It is the argument of the present research that this is a result of the Member States' realisation that the benefits of the Communities cannot be fully achieved without respect for the actions of the institutions. Particularly, without adhering to the rule of law, the provisions of the Communities would be as unenforceable as a traditional international organisation.

The examples of Member State compliance to unfavourable rulings are not difficult to find. The cases of *Cassis de Dijon* and *Francovich* have previously been cited. *Simmenthal*⁵⁵ represents yet another revolutionary Court decision that was at odds with the temporal preferences of Member States. Specifically, in *Simmenthal*, Italy, after initial protestations, acquiesced to the supremacy of Community law. Likewise, Britain fought vigorously against the elevation of European law above national law in the events leading up to the decision in *Factortame*;⁵⁶ however, the Court was resolute in its ruling of supremacy of Community law. The remainder of this research will examine landmark cases in the area of supremacy of European law vis-à-vis the architect's compromise model. In these cases, it will further become apparent that the Member States have foregone their unbridled preferences and complied

⁵⁴ See, for example, Mary L. Volcansek, "Judicial Politics: Acceptance, Indifference, Defiance," *Judicial Politics in Europe: An Impact Analysis*, ed. Mary L. Volcansek (New York: Peter Lang, 1986), 245-273.

⁵⁵ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, *European Court Reports* (1978): 629-657.

⁵⁶ Case 213/89, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. And Others*, *European Court Reports* (1990): I-2433-I-2475; and Case 221/89, *Regina v. Secretary of State for Transport ex parte Factortame Limited and Others (No. 2)*, *Common Market Law Reports* 3 (1990): 589-632.

with European law *in general* (but not always, as will be illustrated subsequently), confirming the logic of the architect's compromise model.

Conclusion

This chapter has focused on explaining the remaining assumptions of the architect's compromise model of European integration. By demonstrating that the Court employs a teleological approach to decision-making and that the Member States have engaged in purposeful action with regard to their membership in the Communities, it has been shown that the primary actors in the model act rationally. In addition, the discussion on judicial activism and restraint underlines the relevance of considering the Court as a strategic actor, which conforms to the third assumption of the architect's compromise model. Finally, the discussion on modified preferences illustrates both the constraints the Court faces when making decisions and the manner in which Member States accept Court decisions. Having firmly established these assumptions, it is suitable to proceed with testing the model against further Court decisions. Thus, in the following chapter, after a short examination of the doctrine of direct effect, the doctrine of supremacy will be explained with the aim of providing the foundation for the case studies on the United Kingdom and Germany which will follow in Chapters VI and VII, respectively. Through such testing, the research will illustrate the ability of the architect's compromise model to correctly explain the Court's role in the process of European integration and the acceptance of ECJ decisions by the Member States.

Chapter V

The Doctrine of Supremacy in European Law

The doctrine of supremacy and the concept of direct effect form the cornerstones of European law.¹ The purpose of this chapter is to examine the origins and development of the doctrine of supremacy as it serves as the area of law which will be tested against the architect's compromise model; however, it is also necessary to briefly examine direct effect since supremacy is built upon this prior doctrine. Established by the Court in *Van Gend en Loos*² as was mentioned previously, direct effect simply means "the immediate enforceability [of Treaty provisions] in national courts by individual applicants."³ This device greatly enhanced the enforceability of Community law since it allows individuals to bring cases directly against an offending Member State for failure to fulfil Community obligations, instead of relying on the much slower process by which another Member State or the Commission brings the case under Article 169 or 170.⁴ Mancini refers to *Costa v. ENEL*⁵--the case which established the

¹ Jean-Victor Louis, *The Community Legal Order*, 3rd rev. ed. (Luxembourg: Office for Official Publications, 1993), 131.

² Case 26/62, *N.V. Algemene Transport--en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, *European Court Reports* (1963): 1-30.

³ Paul Craig and Gráinne de Búrca, *EC Law: Text, Cases, and Materials* (Oxford: Clarendon Press, 1995), 153.

⁴ Stephen Weatherill and Paul Beaumont, *EC Law: The Essential Guide to the Legal Workings of the European Community*, 2nd ed. (London: Penguin Books, 1995), 337.

⁵ Case 6/64, *Flaminio Costa v. ENEL*, *European Court Reports* (1964): 585-615.

principle of supremacy of European law--as the "sequel of *Van Gend en Loos*."⁶ In *Costa*, the Court determined that national law is overridden in the limited field of European law agreed upon by the Member States. Hence, in a truly groundbreaking decision, the Court ruled that within the area of European law, it was the supreme authority. The concept has been largely accepted by the Member States; however, such acceptance has not been without challenges to the Court's authority, which thus makes the doctrine of supremacy especially intriguing to examine by the architect's compromise model since it clearly illustrates the bargaining process implicit in this model. To determine further the aptitude of the architect's compromise model for explaining the ECJ's role in integration, the model will be tested with regard to the concept of direct effect and the doctrine of supremacy. After a brief overview of direct effect and the *Van Gend en Loos* decision, this chapter will examine supremacy in light of the Treaties, the issue of sovereignty, reception of the doctrine by France and the *Costa* case. Before this discussion, however, it is necessary to examine the concept of direct effect.

Direct Effect

Direct effect was devised by the ECJ and is not contained in any of the Treaties. While a number of scholars⁷ have argued that Article 189 (EEC)⁸

⁶ G. Federico Mancini, "The Making of a Constitution for Europe," *Common Market Law Review* 26 (1989): 601.

⁷ See, for example, Louis, 131.

⁸ The relevant section of Article 189 (EEC) reads: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States." The Euratom Treaty in Article 161 contains the same provision, as Hartley

implies this power, the Court's formulation of this principle nonetheless conforms to the notion of the Court as a strategic actor as explained in the architect's compromise model, particularly illustrating the Court's teleological approach. Pierre Pescatore outlines the purposeful manner in which the Court established the principle of direct effect in *Van Gend en Loos* by explaining: "The reasoning of the Court shows that the judges had 'une certaine idée de l'Europe' of their own, and that it is this idea which has been decisive and not arguments based on the legal technicalities of the matter."⁹ Hence, in establishing direct effect, the Court departed from the exact wording of the Treaties and filled in the gaps, effectively transforming European Community law from pure international law into a new creature.¹⁰ The Court succeeded in doing so due to its purposeful approach to the interpretation of the Treaties, which seeks to maximise their effectiveness. Weatherill explains the Court's manoeuvres by noting that "the establishment and development of direct effect. . . represents a classic case study in the European Court's teleological approach to legal integration."¹¹ Moreover, the doctrine has become a cornerstone of European law since the Member States accepted the Court's ruling, contributing greatly to the integrity of European law.¹² An overview of

points out. For a thorough discussion on these provisions, see T. C. Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community*, 2nd ed. (Oxford: Clarendon Press, 1988), 195-200.

⁹ Pierre Pescatore, "The Doctrine of 'Direct Effect': An Infant Disease of Community Law," *European Law Review* 8 (1983): 157.

¹⁰ *Van Gend en Loos* (ECR), 12.

¹¹ Stephen Weatherill, *Law and Integration in the European Union* (Oxford: Clarendon Press, 1995), 97.

¹² For further discussion on direct effect, see Louis, 131-166; or Hartley, 183-214.

Van Gend en Loos will explain the doctrine and allow for an examination of the case through the architect's compromise model.

Summary of *Van Gend en Loos*

Before testing the architect's compromise against *Van Gend en Loos*, the following paragraphs will provide a summary of the facts of the case which is necessary to understanding the Court's decision in the case. The Court laid the foundation for the doctrine of direct effect in its 1963 decision in *Van Gend en Loos*, allowing individuals to invoke Community rights which must be protected by national courts. The case arose out of a dispute by the Dutch company N. V. Algemene Transport- en Expeditie Onderneming van Gend en Loos over a tariff charged for the importation of ureaformaldehyde from Germany into the Netherlands on 9 September 1960. The 8% *ad valorem* tariff was levied in accordance to the guidelines set out by heading 39.01-a-1 of the *Tariefbesluit*, an agreement between Belgium, Luxembourg and the Netherlands concluded on 25 July 1958, and came into force on 1 March 1960. However, Van Gend en Loos lodged an objection to the tariff, arguing that Article 12 of the EEC Treaty (which entered into force on 1 January 1958) provided that Member States should neither introduce any new tariffs on imports or exports having equivalent effect nor increase any existing tariffs between other Member States. Van Gend en Loos held such a position since at the time the EEC Treaty came into effect, the 1947 *Tariefbesluit* set the tariff of such aminoplasts in emulsion as ureaformaldehyde in heading 279-a-2 at 3%. The heading 39.01-

a-1 of the *Tariefbesluit* of 1960 became a subheading of the 1947 *Tariefbesluit* heading 279-a-2, increasing the tariff only on “aminoplasts in aqueous emulsions, dispersions or solutions” while maintaining the 3% tariff on all the products enumerated in heading 279-a-2 of 1947.¹³ The Inspector of Customs and Excise at Zaandam dismissed the objection, claiming its inadmissibility since it dealt with the rate of the tariff, not its application. In its appeal, the case was brought before the *Tariefcommissie* which appealed to the European Court of Justice under Article 177 on 16 August 1962.¹⁴ In its request for a preliminary ruling, the court posed two questions. First, the *Tariefcommissie* asked if Article 12 is directly applicable within the Member States, which would thus create individual rights that the courts must protect. Second, if the first question was answered affirmatively, the *Tariefcommissie* requested a ruling on whether the 8% tariff imposed on Van Gend en Loos constituted an unlawful increase over the lower tariff which was in effect at the time the EEC Treaty came into force with regard to Article 12 of that Treaty.¹⁵

In terms of the first question, Belgium and the Netherlands disputed the admissibility of the case while the Commission argued for its admissibility. The Netherlands argued that the case fell outside the jurisdiction of the Court since it dealt with the application and not the interpretation of the Treaty. Additionally, the Netherlands suggested that allegations of an infringement of the Treaty can only be brought by another Member State or the Commission as outlined in

¹³ *Van Gend en Loos* (ECR), 4.

¹⁴ *Ibid.*, 5.

¹⁵ *Ibid.*, 3.

Articles 169 and 170. Belgium argued that the matter was under the jurisdiction of the national courts. Specifically, the national courts of the Netherlands were confronted with two international treaties and had to turn to the constitutional law and national principles to remedy the situation. Moreover, the Belgian government noted that a ruling by the European Court could not solve the issue at hand since despite the answer that would be forthcoming from the European Court, the national court still had to determine if it could legally violate the Brussels Protocol of 1959 because it conflicted with the EEC Treaty of 1957. Finally, the Commission argued that if the Court found the case inadmissible, individuals would find themselves in the precarious state of being protected from infringements of Community law in all cases except infringement by Member States. Hence, the integrity of European law would be significantly harmed, lacking a mechanism for regulating the infringement of Community obligations by Member States.¹⁶

The players in the case were again divided regarding the substance of the first question. Van Gend en Loos argued that Article 12 (EEC) was directly applicable based on the following reasons: first, it imposed a negative obligation; second, custom duties were set according to Article 14 of the EEC Treaty on 1 January 1957; third, while Article 12 is not specifically concerned with individuals, both individuals and the Community must be protected against the types of adverse effects which infringement of the article might produce; and fourth, national courts, in accordance with the article, must refuse new or

¹⁶ Ibid., 5-6.

increased customs duties. The Commission argued that by establishing the Communities, the Member States sought not only to undertake certain commitments but also to form a body of Community law; therefore, the internal effect of Community law is bound by itself and cannot be determined by national law. Further, the national courts have the duty to guarantee the prevalence of Community law even when subsequent, contradictory national laws are enacted. Moreover, the Commission held that although Article 12 is concerned with the Member States in particular, this did not discount individuals who have an interest in the right to invoke the provision in national courts. Above all, the Commission held that Article 12 was directly applicable since the obligation was unambiguous, not being affected or modified by any other parts of the Treaty, and self-sufficient, requiring no additional legislation to give it effect. The Netherlands, prefacing its arguments by pointing out internal effect is a precondition for direct applicability, maintained that a condition of the EEC Treaty has internal effect only in particular, limited circumstances. Based on its reasoning of the EEC Treaty, the Netherlands further found that Article 12 constituted an obligation, thus allowing the Member States liberty in giving effect to the provision; therefore, the Netherlands argued that since the article does not have internal effect, it necessarily must not have direct applicability. Additionally, the Netherlands maintained that Article 12 does not create rights that individuals may invoke in national courts. Moreover, the Dutch government noted that the Treaty was a form of international law, in which the intentions of the signatories and the provisions of the Treaty were the authoritative arbitrators of conflicts. Thus, the Netherlands asserted that it is

under the jurisdiction of Dutch constitutional law to determine whether or not Article 12 is directly applicable. Similar to the Dutch position, Belgium and Germany also argued that Article 12 does not constitute a provision of direct applicability.¹⁷

Belgium and the Netherlands argued that the second question, which sought to answer whether or not the tariff increase was unnecessarily high, was inadmissible. They based their reasoning on the fact that the question dealt not with interpretation of the Treaty but with application, which is not a concern for preliminary rulings.¹⁸ Specifically, Article 177 states that “the Court of Justice shall have jurisdiction to give rulings concerning. . . the interpretation of this Treaty. . . .”¹⁹ However, Belgium and the Netherlands argued that the case dealt with a question of implementation *not* interpretation. Hence, the two Member States argued the Court did not have jurisdiction to rule on the case. The German government, while not objecting to the admissibility of the question, argued that Article 12 only creates an obligation on Member States, and therefore, under Article 177, the ECJ cannot determine whether national rules conform to the obligation since this would not involve the EEC Treaty’s interpretation. *Van Gend en Loos* maintained that the second question did lie outside of the ECJ’s jurisdiction, and thus submitted the following question in lieu of the original: “Is it possible for a derogation from the rules applied before 1 March 1960 (or more accurately, before 1 January 1958) not to be in the

¹⁷ Ibid., 6-9.

¹⁸ Ibid., 9.

¹⁹ EEC, Article 177.

nature of an increase prohibited by Article 12 of the Treaty, even though this derogation arithmetically represents an increase?”²⁰

With respect to the substance of the second question, Van Gend en Loos re-iterated that the tariff of 8% constituted a breach of Article 12, asserting that it was intentionally charged, not as a result “of the inevitable effect of adapting” the former tariff of 3%.²¹ Both the Belgian and the Dutch governments argued that according to the Benelux Tariff of 1958, the product should have been charged a tariff of 10% in accordance with provision 332 bis; however, the product was not specified properly and was thus charged in accordance with heading 279-a-2. Hence, the governments argued that according to the Brussels nomenclature, the tariff was not in violation of Article 12. Van Gend en Loos maintained that only very limited products could be classified under heading 332 bis. The Commission, while stressing the fact that Article 12 did prohibit the increase or introduction of tariffs, maintained that the particular tariff was applied within Article 12.²²

Judgement of the Court

In contrast to the arguments by Belgium and the Netherlands, the Court initially established its jurisdiction, maintaining that the case dealt with the interpretation of Article 12 in Community law, and thus, it was not an issue for

²⁰ *Van Gend en Loos* (ECR), 9.

²¹ *Ibid.*

²² *Ibid.*, 9-10.

Dutch national law.²³ By doing so, the Court moved to consolidate its legitimacy as the supreme authority to deal with Community issues. In answering the first question, the Court stated:

... the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.²⁴

Within this context, the Court found that Article 12 was, in fact, capable of direct applicability--or *direct effect*--and hence created individual rights that must be protected by national courts, chiefly because the provision was clear, requiring no additional national legislation, and imposing only a negative obligation.²⁵

With regard to the second question, the Court found that it had no jurisdiction to provide a ruling, but it nevertheless reformulated the point of contention as to allow comment. Initially, the Court maintained that the classification of custom duties for unreaformaldehyde was entirely a concern of the Netherlands' customs law; however, the Court reinterpreted the intent of the question in light of "the meaning which should be given to the concept of duties

²³ Ibid., 10-11.

²⁴ Ibid., 12.

²⁵ Ibid., 11-13.

applied before the Treaty entered into force.”²⁶ The Court then argued that an illegal tariff increase can be caused by any number of means, including the re-classification of products, with respect to Article 12. Nevertheless, the Court maintained that the application of Article 12 within the interpretation of the Court was a matter for the individual national courts.²⁷ The Court’s reinterpretation of the question and teleological interpretation of the Treaty conform to the architect’s compromise model’s assumption that the Court functions as a strategic actor. This and other issues in the case will be further examined below in an examination of *Van Gend en Loos* vis-à-vis the architect’s compromise model.

Van Gend en Loos and the Architect’s Compromise Model

With regard to the architect’s compromise model, *Van Gend en Loos* confirms the assumptions concerning the actors, their motivations and modified preferences. In terms of the first two assumptions, the Court and the Member States--in this case, the Netherlands, Belgium and Germany--can be thought of as the primary actors. For the reasons explained in Chapter III (Primarily, while a model which examines all the possible sub- and supra-state actors is descriptive, it has only a limited capacity for explanation; and most of these actors play no primary role in the decision-making process.), we are able to eliminate the other parties involved in the case. Furthermore, in concordance

²⁶ Ibid., 14.

²⁷ Ibid., 14-15.

with the general assumption of the architect's compromise model (as expounded in the previous chapter), we regard the actors as rational to the extent that they exhibit purposeful behaviour. Specifically, the three countries stressed the primacy of the Member States, arguing for the most part that the case was an issue entirely for Dutch jurisdiction.²⁸ The Court, in contrast, employed a teleological approach to strengthen the body of European law. The assumption of rationality in the Court's action is further justified through the discussion below with regard to the Court as a strategic actor and modified preferences.

As only a brief evaluation of the case is warranted and given that the Court's role as a strategic actor and the concept of modified preferences are related, the last three assumptions of the architect's compromise will be evaluated together. First, the Court did play the part of a strategic actor. Realising that its legitimacy is directly related to the integrity of European law, the Court rejected the arguments of the Member States and instead followed the lead of the Commission to argue that it enjoyed jurisdiction to hear the case.²⁹ Once more against the arguments of the Member States, the Court found that individuals did have a right to bring grievances against a Member State, noting that "... Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect."³⁰ Thus, the Court denied the arguments of the Member States and in contrast, established the doctrine of direct effect--one of the central principles of European law--by its teleological

²⁸ Ibid., 6.

²⁹ Ibid., 7.

³⁰ Ibid., 13.

approach to the Treaties. Such manoeuvring was possible based on modified preferences. To explain, the short term interests of the Member States were clearly opposed to such a ruling; however, in order for the provisions agreed upon in the Treaties to establish their respective aims, there had to be a control mechanism. Specifically, the provisions of the EEC Treaty had to be protected in order to achieve the economic aims of the Communities. The Member States subsequently accepted the ruling in *Van Gend en Loos*, and this research argues that such acceptance was based on an appreciation of these modified preferences.

In particular, the predictions of the architect's compromise³¹ are confirmed by the ruling in *Van Gend en Loos*. First, since the Court's action--the establishment of the doctrine of direct effect--clearly advanced European integration, we can assume that the action of the Court can be best represented by a_1 (an action which supports increased integration). Second, against the expressed submissions of the Member States, the Court ruled that individuals did have a right to bring actions against them for the failure of Member States to enact Community law. However, the Member States not only held a set of unbridled preferences, but also a set of modified preferences. To illustrate, the arguments submitted by the Commission actually demonstrate such modified preferences:

. . . the Member States did not only intend to undertake mutual commitments but to establish a system of Community law. . . . The result is first that the effect of Community law on the internal law of

³¹ For a review of the architect's compromise model, see the appendix following Chapter VIII.

Member States cannot be determined by this internal law but only by Community law, further that the national courts are bound to apply directly the rules of Community law and finally that the national court is bound to ensure that the rules of Community law prevail over conflicting national laws even if they are passed later.³²

Hence, the Member States must accept certain unfavourable rulings in the short term in order to gain the benefits of the Communities. Examining the state of nature from the perspective which takes into account the modified preferences, we can assume the state of nature to be best represented by m_1 (modified preferences reflect pro-integration sentiments) since the Member States did wish to proceed with the process of European integration. Weiler points out that this is exactly the manner by which the Member States acquiesced to the groundbreaking decisions in the formative years of European Court judgements: "The fundamental explanation is that the Member States, severally and jointly, balanced the material and political costs and benefits of the Community. Both the Community vision and its specific policy agenda were conceived as beneficial to the actors."³³ Since the Member States judged that the benefits of membership outweighed the costs, the Member States were generally receptive of European Court decisions in this groundbreaking era of the 1960s. Returning to the architect's compromise model, as the Court pursued action a_1 and state of nature m_1 prevailed, the architect's compromise suggests that the outcome is that the Member States accept the decision and that integration deepens, or o_1 . This, in fact, is exactly the outcome that did occur since direct effect has become perhaps the most important principle of European law.

³² *Van Gend en Loos* (ECR), 7.

³³ J. H. H. Weiler, "The Transformation of Europe," *The Yale Law Journal* 100, no. 8 (1991): 2429.

Having sketched the origins and importance of the doctrine of direct effect, it is now possible to undertake a more thorough examination of the concept of supremacy of European law.

Supremacy

The doctrine of supremacy is of paramount importance to this research project since it comprises the area of EC law which will be examined to test the architect's compromise model of European integration. Thus, the remainder of this chapter will provide the necessary background to examine the acceptance of the doctrine of supremacy by the United Kingdom in Chapter VI and by Germany in Chapter VII. This section will be composed of three parts: first, an examination of the Treaties with regard to supremacy; second, an overview of the reception of supremacy by the Member States; and third, an analysis of *Costa v. ENEL* with regard to the architect's compromise model.

The Treaties

As is the case with the doctrine of direct effect, the Treaties contain no expressed provision for the supremacy of Community law. Moreover, in none of the amendments to the Treaties have the Member States included an explicit provision for the supremacy of Community law. Despite this, however, it has been argued by legal scholars that certain provisions of the EC Treaty, notably

Articles 5, 6, 189 and 219, do indeed imply the supremacy of European law.³⁴ Nonetheless, the recognition of the doctrine of supremacy constitutes an area of European law in which the Court has actively worked towards further integration. In much the same manner as has been described previously with regard to direct effect, the Court has employed a teleological approach in order to assume that the Treaties implied supremacy in an attempt to consolidate "the practical foundations of the Community legal order."³⁵ According to Weatherill:

The European Court took the opportunity to deduce the existence of the vital constitutional principle of supremacy from the objectives of the Treaty, despite the absence in the Treaty of any explicit mention of the supremacy of Community law. This reflects the 'teleological' approach consistently favoured by the European Court. . . . Supremacy, like direct effect, has been deduced by the Court as a necessary, albeit, inexplicit, element in the practical realization of the objectives of the Treaty.³⁶

The exact manner in which the doctrine was established, illustrating the Court's teleological, purposeful approach will be analysed in detail in the discussion of *Costa v. ENEL* below. However, first, the reception of the principle by the Member States will be addressed since this will further illustrate the bargaining process between the Court and the Member States.

³⁴ See, for example, Nigel Foster, *EC Law*, 2nd ed. (London: Blackstone Press Limited, 1995), 101.

³⁵ Weatherill, 102.

³⁶ *Ibid.*, 102-103.

Supremacy with regard to Member States

As the doctrine of supremacy is a creation of the Court, its development has been a process of interpretation--in accordance with a teleological approach--of European law by the ECJ and then acceptance or rejection (often in the form of disregard) of such interpretations by the Member States. Hence, the growth of European law is not a static development in which the edicts of the Court immediately modify national law. Rather, the legitimacy of European law is inextricably linked to national implementation of, and respect for, such law from the ECJ. The important mechanism for bringing cases to the ECJ through preliminary rulings provides a good illustration of the necessity that the Member States adhere to European law. Specifically, without the co-operation of the national courts, preliminary rulings would not even be brought before the ECJ since the responsibility to make such appeals lies with the national courts. More pertinent to the present discussion is the fact that the acceptance of supremacy has taken different forms and occurred in different time frames among the Member States. This will be subsequently demonstrated in the remainder of this and the subsequent chapters. Even the fundamental cases of European law are dependent upon the implementation and co-operation of the individual Member States. Thus, the Court must remain cognisant of the fact that the Member States are still the masters of the Treaties when framing judgements. Moreover, the separate Member States have moved at various speeds in espousing European law, with some Member States vigorously supporting decisions while other have delayed bringing national law into line

with Community law. The reasons for such variation are many, including different constitutional models, contrasting national legal systems and various assumptions regarding the authority of the European Union. Weiler describes this two-step process as follows:

The evolutionary nature of the doctrine of supremacy is necessarily bi-dimensional. One dimension is the elaboration of the parameters of the doctrine by the European Court. But its full reception, the second dimension, depends on its incorporation into the constitutional orders of the Member States and its affirmation by *their* supreme courts.³⁷

All of these factors have resulted in different levels of development of the doctrine of supremacy in the different Member States,³⁸ particularly with regard to the responsibilities of national legal systems to co-operate with the ECJ. For example, national courts may effectively halt European integration on a particular matter by refusing to appeal for preliminary rulings on relevant legal uncertainties.

Sovereignty

To understand the complexity involved in the development of the doctrine of supremacy by the Court, the concept of sovereignty must first be examined since the establishment of the doctrine is only enabled through a transference of sovereignty by the Member States. Specifically, the doctrine of supremacy relies on according the ECJ a greater portion of authority which

³⁷ Joseph Weiler, "Community, Member States and European Integration: Is the Law Relevant?" *Journal of Common Market Studies* 21 (1981-1982): 44.

³⁸ For an examination of "the evolutionary nature of the doctrine of supremacy," see Weiler, "Integration: Is the Law Relevant?," 44-47.

must necessarily be transferred from the Member States. The origins of the concept of sovereignty are often traced to Jean Bodin, who characterised the term by noting that “. . . it is the distinguishing mark of the sovereign that he cannot in any way be subject to the commands of another, for it is he who makes law for the subject, abrogates law already made, and amends obsolete law. No one who is subject either to the law or to some other person can do this.”³⁹ Adopting the theoretic foundations of Bodin (since they have dominated thinking on the issue for centuries), the present research recognises sovereignty as the capacity and capability of an entity to exercise the ultimate authority regarding matters within its jurisdiction. Of particular importance to this research is the ability of states to limit their respective sovereignty since this is exactly the phenomenon which has occurred with the transfer of authority to the Communities by the Member States. Decisions from the Court, notably *Costa v. ENEL* which will subsequently be discussed at length, confirm the institutional consolidation of authority which was initially firmly in the grips of the Member States. It is this gradual, although limited, transfer of sovereignty--sketched in rather vague terms by the Treaties--that binds Member States but allows them to remain the ultimate sovereign entities of the Communities. The dichotomy between the Member States who retain supreme sovereignty and the real political power of the Court lies at the foundation of the manner by which

³⁹ Jean Bodin, *Six Books of the Commonwealth* (1576), trans. and abrid. M. J. Tooley (Oxford: Basil Blackwell, [1955]), Book I, Chapter 8, 28. The passage is also cited in D. Lasok and K. P. E. Lasok, *Law and Institutions of the European Union*, 6th ed. (London: Butterworths, 1994), 283.

Community law is incorporated into the domestic legal systems of the Member States.

Hence, unless or until the European Union itself is sovereign, which would involve the formal and complete transfer of sovereignty from the Member States, the inter-governmental structure of the Communities dictates that the Member States individually must remain sovereign. Therefore, this necessarily means that the legitimacy of the Court remains closely associated with the Member State's continued willingness to adhere to its decisions. The claim that there can be only one supreme sovereign for a particular area is not only vindicated by classical thinking on sovereignty but also with regard to modern ideas concerning the pooling of sovereignty. First, according to classical writers on the subject, sovereignty is indivisible. While sovereigns may choose to delegate certain authority to other entities, they nonetheless retain *ultimate* authority. Second, the notion of pooling sovereignty also requires the sovereignty of one entity to be supreme. As explained by Obradovic, the doctrine of divisible sovereignty rests upon the following premise:

... the Treaties establishing the Community did not in any sense remove sovereignty from the Member States and vest it in some external body. ... What is emphasized by this doctrine is that sovereignty which was once exercised exclusively by the individual Member States is now, in certain areas, exercised collectively by the Community. Under this approach there is no final transfer of national sovereignty to the Community as a political body. ... The Community has the powers which it received in the Treaties, i.e. the Community holds not absolutely open-ended but specific powers which can be found throughout the EEC Treaty. That means that sovereign powers are still vested in the nations of the Member States, not in the Community.⁴⁰

⁴⁰ Daniela Obradovic, "Community Law and the Doctrine of Divisible Sovereignty," *Legal Issues of European Integration* no. 1 (1993): 11.

Hence, according to Obradovic, the ultimate authority must lie with a particular entity identified as each of the Member States, which thus means that despite the concept of the pooling of sovereignty, or as Obradovic terms it, divisible sovereignty, there remains one entity that is supreme (the separate Member States). It follows that the supremely sovereign entity is ultimately in control of the integration process. Specifically, this supremely sovereign entity demarcates the limits of the authority it grants to other entities.⁴¹ Thus, as alluded to previously, the supremely sovereign entity only ceases to be supremely sovereign if it actually transfers the greater part of its authority, acquiescing to a new sovereign. Hence, unless the Member States transfer their sovereignty to the Communities, the authority of the Court itself remains contingent upon the continued respect for Court decisions by the separate Member States. Further illustrating this point, the issue of sovereignty will be examined at length with regard to the United Kingdom in the next chapter. Having outlined the issue of sovereignty, it is useful to further examine the nature of international law and the manner in which states incorporate this law into their domestic legal systems.

⁴¹ Hence, *Kompetenz-Kompetenz* remains with the Member States. This concept will be discussed in greater detail with regards to the *Solange* decisions in Germany in Chapter VII.

Monism and Dualism and the Incorporation of International Law into National Legal Systems

Legal theory suggests that with regard to international law, there exists both an internal law and an external law: one emulating from the state (imposed by some political authority) and the other from humanity itself (imposed by moral obligations). In practical terms, the dichotomy between internal and external law is represented by the competing theories of monism and dualism.⁴² According to dualism, there exists two levels of law: the body of law within the state and that outside of the state. Lasok and Lasok explain:

In simple terms this doctrine presupposes the existence of two separate systems of law: international and national, co-existing side by side as it were in watertight compartments. Though international law is the universal law of mankind it stops at the door of the sovereign state and remains outside unless admitted to the territory of the state. It means that international law binds states in their relations with each other but has, subject to few exceptions, no binding force in the territory of the state unless transformed or translated into rules of municipal law.⁴³

Essentially, dualism as applied to the acceptance of Community law refers to those states which require legislation in order to join the separate fields of Community law and domestic law together. Member States assuming this doctrine include Italy, Denmark, Ireland, Greece and the United Kingdom.⁴⁴ Through requiring additional legislation to incorporate international law into the

⁴² For a thorough discussion, refer to Kelsen, 553-588; and J. G. Starke, "Monism and Dualism in the Theory of International Law," *British Yearbook of International Law* 17 (1936): 66-81.

⁴³ D. Lasok and K. P. E. Lasok, *Law and Institutions of the European Union*, 6th ed. (London: Butterworths, 1994), 284.

⁴⁴ *Ibid.*, 289-290. Lasok and Lasok further suggest that Germany, Belgium, the Netherlands and Luxembourg occupy a position between monism and dualism but with a leaning towards dualism.

domestic legal system, national law remains the corpus of the legal system of a dualist country. Hence, international law is simply annexed to the pre-existing legal system, and thus, can likewise be severed. In the case of Britain, for example, an Act of Parliament was required to give effect to the British membership to the European Communities, and it is argued that it requires only a further Act of Parliament to dissolve these ties.⁴⁵

In contrast to dualism, monism assumes the universality of law. Again, Lasok and Lasok provide a useful definition, stating the essence of monism:

Monism is the rival doctrine propounding the existence of a single system of norms or legal rules binding states and individuals alike. States are, after all, nothing but forms of organization or legal fictions whilst the individual is the ultimate subject of law. Both international and municipal law are only parts of the same structure and their rules are interrelated. Consequently monism cuts across sovereignty, bringing the individual face to face with international law and relieving the state of the task of transforming it into rules of domestic law.⁴⁶

It follows that a monist state need not introduce further legislation to bring European laws into force since, according to monism, "international law and national law are both part of one world system."⁴⁷ Among the Members of the Communities, France is the most frequently cited example of a monist state since the French Constitution automatically accords force to law "duly ratified by the Head of State and published" even if inconsistent of French national law.⁴⁸ Hence, in a legal sense, incorporation of international law into the French

⁴⁵ See Lawrence Collins, *European Community Law in the United Kingdom*, 4th ed. (London: Butterworths, 1990), 28.

⁴⁶ Lasok and Lasok, 284.

⁴⁷ T. C. Hartley, *The Foundations of European Community Law*, 2nd ed. (Oxford: Clarendon Press, 1988), 186.

⁴⁸ See Lasok and Lasok, 290.

domestic system should provide fewer problems than incorporating international law into dualist countries. Yet, even in a monist tradition, the bargaining process implicit in the acceptance of European law is evident. The following brief analysis with regard to the acceptance of Community law in France will illustrate this point.

France and the Doctrine of Supremacy

According to Article 55 of the French Constitution, international treaties supersede national law in authority, thus indicating France's monist position. However, the French legal system can be separated into two components--a judicial court (civil and criminal matters) and an administrative court, and these separate courts have not always been uniform in their adherence to Community law. Specifically, the highest judicial court, the *Cour de Cassation*, has been largely committed to strictly following EC law while the highest administrative court, the *Conseil d'État*, has adopted a rather hostile position. Despite the constitutional position on the supremacy of international law, Hartley identifies two primary reasons for the split in the French reception of Community law. First, there is a "the traditional reluctance of all French courts to question the validity of a statute and of the judicial courts to query actions of the administration, whether legislative or executive," and secondly, the supremacy granted to international treaties in Article 55 of the French constitution is conditional upon the application of the treaty by other parties. For these reasons, the incorporation of Community law into French law has not been

without its difficulties.⁴⁹ Given France's prominent position in the Communities, such difficulties have been particularly threatening to the Court's legitimacy as will be further outlined below.

As previously stated, the *Cour de Cassation* has been largely supportive of European law, establishing this precedence in its decision in *Directeur Général des Douanes v. Société des Cafés Jacques Vabre & Société Weigel et Cie*⁵⁰ in 1975. In the case, Vabre, who had imported a soluble coffee extract into France from the Netherlands, sued for the repayment of the difference in the higher tax charged on the imported goods according to a French statute of 1966 in comparison to the lower tax on French products. The *Cour d'Appel* found in favour of Vabre; however, this decision was appealed to the *Cour de Cassation*, and in the appeal, the Customs Director General argued that Article 55 of the French Constitution was irrelevant in this case since adherence to international treaties was contingent upon observance by other signatories, and it was unclear as to whether or not the Netherlands, the other country involved in the case, had abided by this condition of the French constitution. Additionally, the Customs Director did not acknowledge the authority of the *Cour d'Appel* to review the constitutionality of a statute. However, the *Cour de Cassation* agreed with the decision of the *Cour d'Appel*, noting that national courts were bound to respect the new special legal order established by the Community Treaties.⁵¹ Hence, French national courts dealing with civil and

⁴⁹ Hartley, 228-229.

⁵⁰ French *Cour de Cassation*. *Administration des Douanes v. Société Cafés Jacques Vabre and J. Weigel et Compagnie S.à.r.l.*, *Common Market Law Reports* 2 (1975): 336-381.

⁵¹ Hartley, 229-230.

criminal issues in France have complied with the doctrine of supremacy following the lead of the *Cour de Cassation*.

In contrast to the warm reception with which the *Cour de Cassation* has incorporated Community law, the *Conseil d'État* long approached Community law with marked hostility.⁵² The *Conseil d'État* exhibited this hostility to EC law by simply refusing to acknowledge its supremacy over French national law and ignoring both the doctrine of direct effect and the obligation for preliminary rulings, as exhibited in cases such as *Syndicat Général de Fabricants de Semoule de France*.⁵³ However, in the late 1980s, the *Conseil d'État* reversed its hostility towards the European Court as evidenced in decisions such as *Nicolo*.⁵⁴ This initial reluctance of the *Conseil d'État* to acquiesce to European law is thus indicative of the bargaining process that lies at the heart of the European Court's impact on integration. Hence, without co-operation by the French national courts, Community law is irrelevant in France. Such dynamics form a central assumption of the architect's compromise, as illustrated by the Court's role as a strategic actor and the importance of modified preferences, which will be discussed in the following two chapters with regard to British and German acceptance of Community law. For the moment, however, the example of the *Conseil d'État* is reflective of this bargaining procedure.

⁵² For an examination of the possible reasons for the defiance of ECJ decisions by the *Conseil d'État*, see Hartley, 229.

⁵³ French *Conseil d'État*. *Syndicat Général de Fabricants de Semoules de France*, *Common Market Law Reports* (1970): 395-408.

⁵⁴ French *Conseil d'État*. *Raoul Georges Nicolo and Another*, *Common Market Law Reports* 1 (1990): 173-192. For comment on the case, see Philippe Manin, "The *Nicolo* Case of the *Conseil d'État*: French Constitutional Law and the Supreme Administrative Court's Acceptance of the Primacy of Community Law Over Subsequent National Statute Law," *Common Market Law Review* 28 (1991): 499-519.

François Froment-Meurice, a member of the *Conseil d'État*, underlined the conflict between the French court and the acceptance of European law (and hence the results of the bargaining process between the ECJ and France) in his statement:

. . . the *Conseil d'État*. . . has been the slowest in enacting in its own decisions what had been decided previously by the European Court of Justice. We had to wait until 1989 with the case of *Nicolo* (the primacy of Community law on a law coming afterwards, *la loi postérieure*) to see the *Conseil d'État* change its mind about the direct applicability of Community law. We had to wait another year for the *Boidet* case to see that applicable for regulations. Then we had to wait until 1992 for the case of *Rothmans and Philip Morris* to have it applicable for the directives. So it was nearly 30 years after *Costa v. ENEL* that the French *Conseil d'État* admitted that the fundamental principles of this construction were in use in our country.⁵⁵

Froment-Meurice's comments illustrate the essence of the process by which European law is actually integrated into the separate Member States. As has been shown with regard to the *Conseil d'État*, this process occurs as the Member States, through their judiciaries and other means, individually choose whether or not to accept ECJ decisions. It is true that the Member States generally choose to respect these decisions; however, the examples of rebellion by various Member States and national courts is illustrative of the limited "constitutional" authority vested in the ECJ.

⁵⁵ François Froment-Meurice, "The Positioning of the Court of Justice," *The Developing Role of the European Court of Justice* (London: European Policy Forum and Frankfurter Institut, 1995), 87.

Costa v. ENEL

If *Van Gend en Loos* laid the foundation which would subsequently allow the doctrine of supremacy by establishing the concept of direct effect, the case of *Costa v. ENEL* firmly established the doctrine as a cornerstone of European law. In *Costa*, the Court, using a teleological approach to the Treaty, looked beyond the explicit text to determine that European law holds supremacy over national law. A rehearsal of the facts of the case is necessary before analysis can be made, and the following paragraphs will provide such a sketch of the background of the case.

Summary of the Case

The case arose out of a challenge to an Italian law adopted in December 1962. Law No. 1643, along with other legislation, nationalised both the production and distribution of electricity under the auspices of the newly created Ente Nazionale per l'Energia Elettrica (ENEL). Mr. Flaminio Costa--a lawyer who held shares in Edison Volta, which was affected by the nationalisation--refused to pay a bill of 1925 lire demanded by ENEL for the supply of electricity. Mr. Costa held that the Italian law was inconsistent with the EEC Treaty, and thus, contrary also with Article 11 of the Italian Constitution.⁵⁶ The

⁵⁶ Article 11 of the Italian Constitution states:

"Italy renounces war as an instrument of offence to the liberty of other peoples or as a means of settlement of international disputes, and, on conditions of equality with the other states, agrees to the limitations of her sovereignty necessary to an organisation which will assure peace and justice among nations, and promotes and encourages

Italian court in the case, the *Giudice Conciliatore*, honoured Mr. Costa's request for a preliminary ruling under Article 177 as to the interpretation of Articles 37, 53, 93 and 102, referring the case to the European Court of Justice in early 1964.⁵⁷

In the case, arguments were advanced by the Italian government, the Commission and Mr. Costa. The Italian government first objected to the admissibility of the case, stating that the preliminary ruling requested was inadmissible since "... the *Giudice Conciliatore* did not restrict itself to asking the Court to interpret the Treaty but also asked to declare whether the Italian law in dispute was in conformity with the Treaty. . .".⁵⁸ Instead, the Italian government maintained that "Article 177 cannot be used as a means of allowing a national court, on the initiative of a national of a Member State, to subject a law of that State to the procedure for a preliminary ruling for infringement of the obligations of the Treaty."⁵⁹ Mr. Costa and the Commission did not question the reasons for the national court's request for a preliminary ruling nor did they challenge the Court's jurisdiction for addressing the preliminary ruling.⁶⁰

In the appeal for a preliminary ruling, the *Giudice Conciliatore* asked the Court of Justice if the Italian law in question was an infringement of Articles

international organizations constituted for this purpose. "Ente Nazionale Energia Elettrica (ENEL)," *Common Market Law Review* 2 (1964-1965): 224.

⁵⁷ *Costa v. ENEL* (ECR), 588-589.

⁵⁸ *Ibid.*, 589.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

102, 93, 53 and 37 (EEC). Mr. Costa initially accused the Italian government of a breach of Article 102,⁶¹ which states that “where there is reason to fear that the adoption or amendment of a provision laid down by law, regulation or administrative action may cause distortion within the meaning of Article 101, a Member State desiring to proceed therewith shall consult the Commission. . . .”⁶² While the Commission did not recognise a distortion, it noted that if there were any question as to its existence, then the Italian Government should have consulted the Commission before adopting the nationalisation legislation. However, the Italian Republic--whose arguments were supported by ENEL--noted that:

. . . the Commission, when informed by a written question submitted by a German deputy, accepted nationalization in this case and referred to Article 222. There is no distortion within the meaning of Article 102 as long as it is a question of setting up a public service intended to achieve the objectives of public utility indicated in Article 43 of the Italian constitution and as long as the conditions of competition are not adversely affected.⁶³

Again, the separate parties were divided over the interpretation of Article 93. The article states that the Commission must intervene in the event that there exists a violation of Article 92,⁶⁴ which states that:

Save as otherwise provided in the Treaty, an aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the Common Market.⁶⁵

⁶¹ Ibid., 589-590.

⁶² EEC Treaty, Article 102, 1.

⁶³ *Costa v. ENEL* (ECR), 590.

⁶⁴ Ibid., 590.

⁶⁵ EEC Treaty, Article 92, 1.

Mr. Costa argued that nationalisation constituted providing "hidden aid" to the industry and hence, argued that the Commission had the responsibility to act as described in Article 93. While the Commission acknowledged its right to take action against Member States who violate Article 93, it did not specifically find fault with the law in question. Rather, the Commission was concerned over the Italian Republic's failure to notify the Commission of the legislation. Arguing that the nationalisation had "nothing to do with Community law," the Italian Republic and ENEL maintained that the case demonstrated no incompatibility between the nationalisation and Article 93.⁶⁶

To appreciate the arguments concerning Article 53 (EEC), it is useful to quote the provision, which states: "Member States shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided by this Treaty."⁶⁷ Mr. Costa argued that not only did nationalisation violate Article 53, but it was also inconsistent with Article 222, which Costa maintained could not "justify the legality of every conceivable system of property ownership," including the elimination of private property.⁶⁸ Both the Italian Government and ENEL argued that the nationalisation did not infringe upon Article 53 specifically because the legislation did not discriminate based upon nationality. While the Commission reiterated its position on nationalisation being justified under Article 222, it reasoned that "Article 53 however applies to possible restrictions on the right of

⁶⁶ *Costa v. ENEL* (ECR), 590.

⁶⁷ EEC Treaty, Article 53.

⁶⁸ *Costa v. ENEL* (ECR), 590.

establishment of nationals of other States which might result from a case of nationalization, such restrictions not being justified by technical requirements in the sector in question.”⁶⁹

The final dispute in the case lay in the interpretation of Article 37, of which the relevant provision reads:

Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the Articles dealing with the abolition of customs duties and quantitative restrictions between Member States.⁷⁰

Mr. Costa maintained that this article should be applied to nationalisation since it establishes a commercial monopoly, which, as he argued, inherently makes trade more difficult, if not impossible. Furthermore, Costa argued that Article 37 must apply not only to actual discrimination, but also to potential discrimination, and that it must not be restricted to addressing existing cases but also must prevent the establishment of discrimination. The Italian Republic countered Mr. Costa’s argument by arguing that Article 37 cannot apply to public services or with enterprises concerned with limited natural resources;

⁶⁹ Ibid., 591.

⁷⁰ EEC Treaty, Article 37, 1 and 2. For clarification of this provision, see the remainder of Article 37.

therefore, the Treaty's regulation of commercial enterprises is not equivalent for the operation of public services. ENEL's reasoning echoed that of the Italian Republic and argued that Article 37 applied to public and private organisations whose chief objective was to interfere with the free movement of goods. The Commission regarded the case as the establishment of a new monopoly to obstruct the free movement of goods and services and thus prohibited by Article 37. However, the Commission further maintained that "there is no need to inquire whether the creation of a monopoly of a commercial character is inconsistent with Article 37 (2), where the importation and exportation of the said commodity are not subject to the discretionary power of the administering body."⁷¹

The Court's Decision in *Costa*

Although the Court could not rely on any specific provision in the EEC Treaty to verify supremacy of Community law, the ECJ nonetheless argued that the nature of the Treaty assumes the supremacy of European law.⁷² Stein points out that provisions of Community law "would be meaningless if a member could defeat its obligations simply by enacting a contrary national law."⁷³ Moreover, Article 177 obliges national courts to appeal for preliminary rulings; if the national courts could then simply ignore these rulings, then Community law would quickly lose legitimacy. It was such logic that led the Court to simply

⁷¹ *Costa v. ENEL* (EEC), 591-592.

⁷² *Louis*, 167.

⁷³ Eric Stein, "Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the *Costa* Case," *Michigan Law Review* 63 (January 1965): 500.

formulate the doctrine of supremacy despite its absence from the Treaty. The Court justified this reasoning by arguing:

The law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.⁷⁴

Before this pivotal reasoning by the Court, it was unclear as to the exact authority of Community law given that the Treaty contains no provision for its supremacy over domestic law.

In providing interpretations on Articles 102, 93, 53 and 37, the Court firmly defended Community law despite making concessions to the Member States. To begin, the Court ruled that while Member States have bound themselves in Article 102 to consulting the Commission when a piece of legislation might create a distortion in Community law, this does not necessarily result in the establishment of individual rights which must be protected by the separate national courts. Similarly, the Court held that Article 93 did not provide for individual rights with regard to this case although it did acknowledge the creation of certain individual rights in the final provision of the Article. The Court held that "this obligation [to consult the Commission] does not, however, give individuals the right to plead, within the framework of

⁷⁴ Ibid., 593-594.

Community law and by means of Article 177, either failure by the State concerned to fulfil any of its obligations or breach of duty on the part of the Commission.”⁷⁵ With regard to Article 53, the Court reasoned that this provision was met as long as a particular Member State introduced no more severe regulations for non-nationals as for nationals of that State. Therefore, the Article may create individual rights which must be protected by national courts. Finally, the Court found that Article 37 strictly prohibited the establishment of new monopolies, and since the article contained no reservations, it constituted a direct effect obligation on the Member States. Therefore, Article 37 created individual rights which must be protected by the national courts.⁷⁶

Analysis of *Costa v. ENEL*

Having briefly outlined the case, we are now in a position to examine *Costa* according to the five assumptions of the architect's compromise model and its predictions on expected outcome. For the purposes of this research, the above reasoning by the Court is extremely significant since it illustrates the Court's willingness to deviate from the precise wording of the Treaty and espouse a teleological approach in concurrence with the assumptions of the architect's compromise model. An analysis of the case will illustrate the

⁷⁵ Ibid., 596.

⁷⁶ Ibid., 595-600.

pertinence of the architect's compromise model to explaining the nature of the decision and the subsequent acceptance of the doctrine of supremacy.

To begin, while Mr. Costa, ENEL and the Commission were all instrumental in offering perspectives on the questions framed by the *Giudice Conciliatore*, the chief actors must be the Court and Italy (or the Member States in general) since the Court ultimately issues the ruling that establishes a fundamental principle of Community law. Furthermore, the Member States are the only actors that possess the ability to mount a serious challenge to the Court's authority by amending the Treaties. In addition, the primary actors (the Court and the Italian Republic) exhibited purposeful behaviour. In particular, the Italian Republic vigorously defended its supposed right to nationalise the production of electric power in Italy. Likewise, the Court made a calculated attempt to further integration with one of the boldest decisions it has ever made.

In terms of the Court's role as a strategic actor, the events of the case conform to this assumption of the architect's compromise. Specifically, the Court greatly enhanced the legitimacy and authority of European law through passing such a determined, "strong statement."⁷⁷ Stein's analysis of the case adds further credence to the claim that the Court played the role of a strategic actor:

The Community Court must, of course, keep in mind at all times that it is not a federal court backed up by an integrated federal power, and it must be aware of the dangers inherent in pressing "legal integration" too far ahead of integration in the economic and political fields. There is,

⁷⁷ Weatherill, 106.

however, evidence that the court calculated the risk correctly when it declared the supremacy rule in the *Costa* case. . . .⁷⁸

By appreciating the de facto political constraints on the Court by the Member States and the Court's responsibility to further European integration, the *Costa* decision illustrates clearly the manner in which the Court strategically balanced these two opposing forces to best maintain its own legitimacy, which will become even more apparent in the discussion of modified preferences below.

As the architect's compromise model assumes, modified preferences played a particularly important role in the acceptance of the case by the Member States. As has been previously noted, the doctrine of supremacy is not specified by the Treaties; therefore, the Court invented a mechanism by which Community law could be advanced. As the legitimacy of the decisions of the Court are ultimately contingent upon their acceptance by the Member States, the decision in *Costa v. ENEL* was entirely justified. If the case were truly the work of an activist court, the Member States could have curtailed the power of the Court. This, however, did not happen. While there was opposition to the doctrine of supremacy at some levels, including the French *Conseil d'État* and the Italian *Corte Costituzionale*, Mancini argues that ". . . the Court's supremacy doctrine was accepted by the judiciaries and administrations of both the original and the new Member States. . . ."⁷⁹ Recognising the Court's role as a strategic actor, Weiler suggests also that:

⁷⁸ Stein, 516.

⁷⁹ G. Federico Mancini, "The Making of a Constitution for Europe," *Common Market Law Review* 26, 1989: 600.

... it would be naive to imagine that in these developments the Court was simply motivated by legal principles. Prodded along by and in alliance with the Commission, which intervenes as of right in all cases coming before it, the Court was undoubtedly inspired by a political conception of a Community which was to evolve into an integrated union. Charged, together with the other institutions in Article 4 of the Treaty with the carrying out of the tasks entrusted to the Community the Court was merely doing its "bit" to fulfil one of the tasks enumerated in Article 2, namely bringing about closer relations between the States belonging to the Community.⁸⁰

Hence, the architect's compromise model is vindicated by the *Costa* case in its assumption of the Court as a strategic actor guided by modified preferences.

As has been established, the events of *Costa* clearly conform to the assumptions of the architect's compromise model.⁸¹ To begin, the action of the Court is clearly represented by a_1 (pro-integration decision) since the decision unquestionably advanced European integration. Next, despite the Italian opposition to the case, Stein suggests that the modified preferences of the Member States were sympathetic to further integration.⁸² Such desires, however, to achieve the aims of the Treaty were tempered by the real political impact that the doctrine of supremacy would have on the Member States. Hence, it was with some resignation that the Member States approached this decision.⁸³ Since the model does not rely on unbridled preferences, and recognises instead modified preferences, the state of nature can be represented by m_2 (modified preferences indifferent to integration) since the Member States

⁸⁰ Weiler, "Integration: Is the Law Relevant," 46.

⁸¹ See the appendix following Chapter VIII for a review of the architect's compromise model.

⁸² Stein, 516-517.

⁸³ Peter Hay, "Supremacy of Community Law in National Courts," *American Journal of Comparative Law* 16 (1968): 543-550.

did wish to accord Community law the character that would allow for its effective regulation of the Communities (although they were not necessarily ready to completely recognise the supremacy of European law). Based on the action of the Court (a_1) and the state of nature (m_2), the outcome of the case as predicted by the architect's compromise is represented by o_4 , or a decision in which the Member States accept the decision but reserve the right to alter the authority of the Court in the future. This prediction appears reflective of reality since the Member States did accept the decision although certain countries delayed fully accepting the doctrine of supremacy until much later. Moreover, the authority of the Court has constantly been attacked although not altered. Hence, the architect's compromise once again provides a concise and predictive means to examine the Court's role in European integration.

Conclusion

Given that the development of the concept of supremacy is a creation of the Court, its development is dependent upon the acceptance of the separate Member States. Having examined supremacy in a general sense, we turn now to examining it in a national context to further test the architect's compromise model. The following chapter will thus examine the doctrine of supremacy and its acceptance in the United Kingdom. General comments will initially be made, and then, several cases will be examined using the architect's compromise model to further demonstrate the model's ability to explain the integration process.

Chapter VI

British Acceptance of the Doctrine of Supremacy

Having first derived the architect's compromise model and second examined the theoretic foundation of the principle of supremacy of European law, we now turn to testing the model. To further analyse the effectiveness of the architect's compromise model, this study will trace the history of Britain's participation in the European Union with respect to the supremacy of European law. The model will be examined first in light of the events that preceded and surrounded Britain's accession to the Communities and then with regard to three significant cases involving Britain's acceptance of the doctrine. Through examining these events, the chapter will illustrate the suitability of the architect's compromise model for explaining the ECJ's role in European integration in the United Kingdom

Debate Preceding Britain's Accession

The dialogue that preceded Britain's accession to the European Communities provides the initial focus for examining Britain's relation to European law since it is indicative of the purposeful actions and decisions which have characterised the process of legal integration. As has been discussed previously, earlier negotiations were characterised by a lack of French support for the membership of the United Kingdom, which twice led to futile attempts

by the British government to join the Communities.¹ In the debates that preceded Britain's accession, it was clear that the British Parliament made a calculated decision in foregoing an element of sovereignty to gain the benefits of the Communities as will be illustrated by an examination of the House of Commons debates on joining the EEC, Euratom and the ECSC. Once again, neofunctionalist arguments are particularly discredited with neofunctionalism's notion that integration occurs organically. Rather, the following discussion will demonstrate that Britain's accession followed careful consideration of the future impact and thoughtful study of the commitment involved. Hence, these events appear to reflect the pattern of bargaining which is a theoretical assumption of the architect's compromise model. Specifically, the process of legal integration in Britain has been characterised by an initial transfer of authority to the Court to fill in the gaps of the Treaties, and subsequent acceptance of ECJ rulings by the United Kingdom based on modified preferences.

Legal and Constitutional Implications of Membership

Concern regarding "legal and constitutional implications," such as the impact of membership on Parliamentary authority and the harmonisation of British laws to conform to European laws, occupied an important position in the discussions over British membership in the Communities. From the Command

¹ For a discussion of the history of the British application for membership, see Neill Nugent, William E. Paterson and Vincent Wright, eds., *The Government and Politics of the European Union*, 3rd ed. (London: Macmillan, 1994), 27-30.

Paper² commissioned on this subject, it is apparent that the British government was aware of the significant impact that joining the Communities would exert on the British legal system and structure. Such an appreciation for the scope and depth of the influence that membership could have on Britain is a fundamental assumption of the architect's compromise model, which recognises the rationality of the actors. In other words, Britain faced the decision whether or not to join the Communities and sought to make a strategic decision as to maximise its preferences.³ We can see this in the fact that a majority in Parliament acknowledged membership in the Communities as a means to maximise security and economic growth in the Parliamentary debates concerning membership in October 1971, which will subsequently be discussed at length. Furthermore, in contrast to the neofunctionalist model which assumes that integration occurs from a virtual organic growth of the Communities themselves, the Command Paper is clear on the ultimate implications that joining the Communities would have on the United Kingdom. Recognising that the (less than) "revolutionary developments" that have occurred during the past few decades were actually anticipated by the British Government in the Parliamentary debates of October 1971 completely discredits the neofunctionalist argument that spillovers organically led to further integration.

² United Kingdom. *Legal and Constitutional Implications of United Kingdom Membership of the European Communities*, Cmnd. 3301 (May 1967).

³ United Kingdom. *The United Kingdom and the European Communities*, Cmnd. 4715 (July 1971). This paper made the argument for British membership, particularly pages 7-17. See also Central Office of Information, *British Membership of the European Community*, Pamphlet 109 (1973), especially pages. 18-20, for a concise account of benefits of membership for Britain.

Such factors further confirm the problems inherent in neofunctionalism outlined earlier in this research and conform to the current study's research question.

Preliminary Discussion Concerning British Accession

The manner and events that surrounded Britain's accession to the Communities also reflect the rational choice assumptions of the architect's compromise model. Specifically, Parliament weighed the prospects for joining the Communities to determine whether or not the economic and security benefits believed to be associated with membership merited the surrender of a portion of sovereignty necessary to gain these advantages. Command Paper 3301 made the effects of membership on Britain strikingly clear, by explaining that "if this country became a member of the European Communities it would be accepting Community law. By 'Community law' is meant the whole body of legal rights and obligations deriving from the Treaties or their instruments, whether conferred or imposed on the Member States."⁴ Thus, in joining the Communities, Britain would be bound by not only the Treaties but also the *acquis communautaire*, as is every other Member State. Britain (at a time before the country accepted the position of one of the "architects" of the Communities) acknowledged in 1967 that "the structure of the Treaties and of the regulations and other instruments issued by the authorities of Communities differs from that of statutes and subordinate legislation in the United Kingdom; provisions are

⁴ United Kingdom. *Legal and Constitutional Implications of United Kingdom Membership of the European Communities*, Cmnd. 3301 (May 1967), 8.

framed in more general terms and more is left to judicial interpretation.”⁵ Given its clear wording, one may infer from the Command Paper that Britain knew full well of the potential for integration brought by the Courts that membership would inevitably bring, or, to refer to it in contemporary jargon, how the Court would be responsible for “filling in the gaps” of the Treaties. Moreover, the United Kingdom recognised that the legal climate of the Communities would not rest solely on the specific provisions contained in the Treaties, but rather, these Treaties would provide the framework, and the body of European court cases would fill out the skeleton as is further discussed in the White Paper. Accordingly, the White Paper reads:

On the United Kingdom joining the Communities, United Kingdom courts would be enabled, and in the case of final courts would be required, to refer any questions raised before them on the interpretation of the EEC or EURATOM Treaties to the European Court for a ruling. Thus provisions of Community law raising difficulties in their application to our legal system would in time become clarified by decisions of the European Court.⁶

Therefore, Britain perceived that membership would ultimately produce a complex and interdependent legal system long before joining the Communities. While it is obvious that Parliament could not possibly foresee the specifics of the actual development of the European legal system, it is nonetheless clear that the British Parliament realised the fundamental--although far from complete--surrender of sovereignty that accession to the Communities would entail.

⁵ Ibid., 10.

⁶ Ibid.

In addition to the clear understanding of the deep implications that membership would eventually have for the United Kingdom, the media confirmed the significance of joining the Communities. According to *The Times* on 1 June 1967, "Legislation accepting in advance that future rulings by Common Market institutions must automatically become part of British law would be necessary if Britain's application to join the E.E.C. were accepted. . . ."⁷ The article went on to be even clearer on the significance of membership on Parliament:

Technically, of course, these rulings would derive all their force under British law from the original enactment by Parliament. But in practice Parliament would have no control over them, and they would take priority over any domestic law that clashed with them. Nor would Parliament be able to pass fresh legislation inconsistent with them.⁸

Further, the same article described the "process of filling in the gaps" which has been the role of the Court for bringing the aims of the Treaties to fruition:

The powers of the Community institutions are fixed by the treaties, and so are the general aims that they may pursue. There is no danger that they might be changed so as to conflict with Britain's interests after we joined the E.E.C., for these parts of the treaties can only be modified with the unanimous consent of member countries.⁹

Based on the Government papers and the views of the press, it is reasonable to assume that Parliament clearly understood that the Treaties contained the broad blueprint for constructing the Communities which could only be altered by the Member States themselves. By agreeing to such a broad outline for the Communities, Britain essentially delegated to the institutions of the

⁷ "Basic rights not destroyed," *Times*, 1 June 1967, 17.

⁸ Ibid.

⁹ Ibid.

Communities the responsibility of transforming these broad guidelines set forth in the Treaties into effective policies for achieving the aims of the Communities.

Although the Communities would be granted authority to achieve the goals of the Treaties, the White Paper addressed the future of Britain's sovereignty:

The Community law having direct internal effect is designed to take precedence over the domestic law of the Member States. From this it follows that the legislation of the Parliament of the United Kingdom giving effect to that law would have to do so in such a way as to override existing national law so far as inconsistent with it. This result need not be left to implication, and it would be open to Parliament to enact from time to time any necessary consequential amendments or repeals. It would also follow that within the fields occupied by the Community law Parliament would have to refrain from passing fresh legislation inconsistent with that law as for the time being in force.¹⁰

According to such reasoning, it is clear that in joining the Communities, Parliament would forego an element of sovereignty, and thus would be responsible for complying with the obligations arising out of transferring such authority. However, the White Paper suggested that doing so would not truly constitute a radical transfer of sovereignty and Parliament would retain the ability to legislate according to its will although it must not impinge upon the element of authority granted to the Communities.

Hence, supremacy for European law in the United Kingdom actually flows from the powers granted by the British Parliament and not from the Communities themselves; put simply, *Kompetenz-Kompetenz* remains with

¹⁰ Cmnd. 3301, 8.

Westminster according to the *European Communities Act 1972*. To illustrate, Command Paper 3301 states that future Community laws would be accepted in advance and would "derive their force under the law of the United Kingdom from the original enactment passed by Parliament," just as ordinary legislation.¹¹ Thus, the constitutional structure of the United Kingdom was not fundamentally altered to grant the Communities a supreme legal position to Westminster; rather, Parliament remains sovereign despite having transferred an element of its sovereignty to the Communities. On a practical level, it is revealing to note that without the willingness of the British government to abide by norms and regulations of the Communities, the United Kingdom could relinquish its membership. Although such an act might lead to a myriad of legal uncertainties, it is nonetheless possible according to Parliament. Lawrence Collins explains that "the 1972 Act proceeds on the basis of the legal sovereignty of Parliament, and is expressive of and subject to the principle of sovereignty of Parliament. It has been enacted but there is no fetter on Parliament--it can amend or repeal it."¹² Given the voluntary position which the British government has undertaken, it must be recognised that a lack of British willingness to abide by these laws would render them inapplicable to the United Kingdom. However, before engaging in a discussion of the effects of the *European Communities Act* and its impact on European integration in the United Kingdom, it is first necessary to examine the debate that preceded it to illustrate the manner in

¹¹ Cmnd. 3301, 8.

¹² Lawrence Collins, *European Community Law in the United Kingdom*, 4th ed. (Butterworths: London, 1990), 28.

which Parliament itself conformed to the logic underlying the architect's compromise model.

Parliamentary Debate

On 21 October 1971, the Secretary of State for Foreign and Commonwealth Affairs, Sir Alec Douglas-Home began “the great debate,” and brought the motion forward “that this House approves Her Majesty’s Government’s decision of principle to join the European Communities on the basis of the arrangements which have been negotiated” by the Government.¹³ While it is axiomatic to note that the debate served to confirm Britain’s ambition to join the Communities, a careful study of the substance of the debate reveals inconsistencies with Slaughter and Mattli’s neofunctionalist model and Garrett and Weingast’s neorationalist model. In contrast, a rehearsal of the events of the debate will highlight the effectiveness of the logic underlying the architect’s compromise to explaining legal integration in the UK.

As has already been noted, the impact of membership on Britain’s sovereignty occupied a key role in the discussion. Given this concept’s importance to law and particularly with the principle of supremacy of law, the debate concerning sovereignty merits a thorough discussion to illustrate Parliament’s treatment of the matter. In the debate, the British loss of an

¹³ *House of Commons Official Report*, 21 October 1971, col. 912.

element of sovereignty was certainly recognised. Sir Gerald Nabarro quotes the former Lord Chancellor, Lord Dilhorne:

The Rome Treaty, while leaving intact the separate existence of the member States and their constitutional organs. . . creates a Community, a new international person, with its own organs of Assembly, Council, Commission and Court of Justice. These organs. . . have in the spheres in which they operate, and in those spheres only, certain supra-national powers which override those of the national constitutional bodies, and which also are incapable of challenge in the national courts of the member States.¹⁴

J. Enoch Powell's reasoning was representative of those who feared joining the Communities:

I do not think the fact that this involves a cessation--and a growing cessation--of Parliament's sovereignty can be disputed. Indeed, I notice that those who are the keenest proposers of British entry are the most ready to confess--not to confess, but to assert--that of course this involves by its very nature a reduction of the sovereignty of the House. Nevertheless, it is worth while reminding the House that the advice which it was given by the Lord Chancellor in Cmnd. 3301--The highest source of legal advice which the House can receive--put the nature of the transfer of sovereignty very succinctly in paragraph 22:

"The constitutional innovation would lie in the acceptance in advance as part of the law of the United Kingdom of provisions to be made in the future by instruments issued by the Community institutions."¹⁵

Additionally, in a display of intense fear over the constitutional future of Britain, Anthony Wedgwood Benn argued ". . . that the Government have set out upon a course that can only be interpreted in terms of a major federal structure for Western Europe. . . . By playing down the politics of it, one can be sure that the public do not understand what it is really about."¹⁶ Such a statement conforms

¹⁴ *House of Commons Official Report*, 21 October 1971, col. 977. (Quoted from *House of Lords Official Report*, 2 August 1962, vol. 243, col. 418.)

¹⁵ *House of Commons Official Report*, 28 October 1971, col. 2186.

¹⁶ *House of Commons Official Report*, 27 October 1971, cols. 1758-1759.

to neofunctionalist reasoning regarding sectoral spillover and an organic extension of Community competencies; however, history has failed to confirm Benn's fear. On the contrary, Community competencies have only been extended by the agreement of the Member States through Treaty revisions.¹⁷

Moreover, far from conforming to neofunctionalist theory, a number of Members clearly appreciated the bargaining and co-operating situation that membership in the Communities entails. According to the Chancellor of the Exchequer Anthony Barber,

... we have to weigh costs and benefits of very different kinds. The fact is that they cannot be translated into a common measure, involving, as they do, political values, economic values and social values. In the last analysis, and it is, after all, the last analysis which we are trying to make in this debate, when all the arguments and all the statistics and all the historical analogies and all the economic forecasts are exhausted, it must be a matter of judgment.¹⁸

Thus, the House of Commons decided the issue by weighing the pros and cons of membership and finally determined that the United Kingdom's interests were best served by membership in the Communities. Hence, the bargaining logic and reliance on purposeful actions implicit in the architect's compromise model conforms to the actual events that led to Britain joining the Communities. Moreover, rather than conforming to the neofunctionalist logic that spillovers and sectoral expansion are responsible for the growth of the Communities, this

¹⁷ The extension of Community competencies in the *Single European Act*, *Treaty on European Union* and the Amsterdam Treaty, for example, is indicative of the willingness of the Member States to expand the authority of the Communities.

¹⁸ *House of Commons Official Report*, 27 October 1971, cols. 1736-1737.

present research maintains that this growth was a result of calculated, rational choices.

Furthermore, it is axiomatic to point out that the decision to enter the Communities has not functioned to settle all disputes over sovereignty and related tensions between the British government and the Communities. Despite the doctrine of supremacy of Community law, the present research continues to argue that the Member States themselves--and in this case, the British government--ultimately enjoy a particular "supremacy" over the Court: namely, the Court enjoys supremacy over specific areas of law in the UK only because the British Parliament allows this to be. As Jowell and Oliver note, ". . . the whole *raison d'être* of the Community is that power can be shared and sovereignty divided so as to create a political entity capable of carrying out common policies without compromising the identity of the component units."¹⁹ Before turning to the architect's compromise model, it is necessary to examine the idea of the sovereignty of Parliament to provide a sketch of the political and philosophical framework upon which European integration occurs in the United Kingdom. Only then can the dynamics underlying the architect's compromise be fully understood.

¹⁹ Jeffrey Jowell and Dawn Oliver, eds., *The Changing Constitution*, 3rd ed. (Oxford: Clarendon Press, 1994), 19.

Sovereignty and Parliament

Reflecting the orthodox view of sovereignty, A. V. Dicey defines the concept by stating: "The principle of Parliamentary sovereignty means. . . that Parliament. . . has, under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."²⁰ Bradley summarises Dicey's arguments by noting that "there are no legal limits to the legislative authority of Parliament."²¹ However, membership in the Communities *does* represent a restraint--although voluntary--on Parliament's authority; therefore, it is prudent to address the criticism aimed at the traditional view of sovereignty espoused by those such as Dicey. Craig argues that "the existing debate on sovereignty pays scant attention to the *reasons* why Parliament should be said to be sovereign and to the *conclusions* drawn from this reasoning. Each generation of writers continues to quote scholars from an earlier generation without any real understanding of why the latter had claimed that Parliament was sovereign, and without any discussion of whether the reasoning used was still applicable today."²² Since the present

²⁰ A. V. Dicey, *Law of the Constitution*, 9th ed. (London: Macmillan and Co., 1939), 39-40. Bradley and Ewing point out that ". . . Dicey was writing at a time when England was often used as a loose synonym for Great Britain or the United Kingdom. . . ." See A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, 11th ed. (New York: Longman, 1993), 69.

²¹ Bradley, A. W., "The Sovereignty of Parliament--in Perpetuity?," *The Changing Constitution*, 3rd ed., eds. Jeffrey Jowell and Dawn Oliver (Oxford: Oxford University Press, 1994), 81.

²² P. P. Craig, "Sovereignty of the United Kingdom Parliament After *Factortame*," *Yearbook of European Law* 11 (1991): 234.

research relies on these classical arguments regarding sovereignty, a justification for their relevance is pertinent in light of Craig's comments.

Sovereignty: A Historical Note

Any being possessing sovereignty must enjoy a form of authority within a particular area for which the being is sovereign. Furthermore, the being must have the status as the supreme authority within this area of its sovereignty. This is not to suggest that threats upon this sovereignty cannot be lodged by those wishing to usurp the supreme authority of a sovereign, however. The history of human interaction reflects a system built on a concept of sovereignty, whereby civilisations in varied forms have been organised in a manner that reflects the ultimate authority in the society. Primitive humans, Greek city-states, Native American tribes and African kingdoms all had a power structure whereby a particular entity possessed the authority to govern the community just as the European state model following the Peace of Westphalia possesses such a power structure. These societies all reflect human organisation based on the concept of a "sovereign" which possesses the authority to exercise the supreme power for a particular group. Such "sovereigns" have taken many forms (as has been mentioned previously); however, they are all similar in the fact that they each contain some entity--be that in the form of a single person, a small group, a combination of groups or even much larger forms--in which the authority to exercise supreme power lies.

Given that the United Kingdom has no written constitution which might be relied upon for settling constitutional disputes, supremacy lies with Parliament itself. Specifically, unlike the American system of judicial review based on the decision *Marbury v. Madison*,²³ “in the United Kingdom the legislative supremacy of Parliament appears to be the fundamental rule of constitutional law and this supremacy includes power to legislate on constitutional matters. In so far as constitutional rules are contained in earlier Acts, there seems to be no Act which Parliament could not repeal or amend by passing a new Act.”²⁴ Wade notes that “there is one, and only one, limit to Parliament’s legal power: it cannot detract from its own continuing sovereignty.”²⁵ To illustrate this assertion, Wade cites, in particular, arguments in the English case *Ellen Street Estates Ltd. v. Minister of Health*.²⁶

The legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislature.²⁷

Hence, according to the doctrine of Parliamentary sovereignty, Parliament cannot be bound by any other entity.²⁸

²³ The United States Supreme Court established the convention of judicial review of Acts of Congress in which the Court decides whether or not such Acts are constitutional in *Marbury v. Madison*. See United States Supreme Court. *William Marbury v. James Madison, Secretary of State of the United States*, *United States Supreme Court Reports*, Cranch 1 (1803): 136-179.

²⁴ Bradley and Ewing, 71.

²⁵ H. W. R. Wade, “The Basis of Legal Sovereignty,” *Cambridge Law Journal* 13 (1955): 174. The passage is also quoted in Craig, 223.

²⁶ King’s Bench Division. *Ellen Street Estates, Limited v. Minister of Health*, *King’s Bench Law Reports* 1 (1934): 590-598.

²⁷ Quoted in Wade, “Basis of Legal Sovereignty,” 175; and in Craig, 223.

²⁸ H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), 66.

Clearly, given these arguments within the field of European law, such reasoning seems contradictory since the British government must comply with European Court decisions or risk facing the payment of damages for non-implementation of Community legislation.²⁹ However, as Josephine Steiner points out, the threat of a penalty or even an actual penalty is rife with problems since, for example, "there is no provision. . . for periodic payments, or for the enforcement of fines and penalties."³⁰ As such, the threat of penalties provides only a partial explanation of the Member States' willingness to obey the Court.

Instead of such punitive threats, this research has suggested that the Member States are compelled by modified preferences to abide by ECJ decisions, and thus, restrain their actions, which might possibly take the form of refraining from making certain legislation. However, none of this is severely damaging to the concept of Parliamentary supremacy. On the contrary, the relationship between the United Kingdom and the Court underlines the supremacy of the Member States. It is undeniably true that the Member States have transferred a significant element of their sovereignty to the Communities. The fact, however, that the Communities is more inter-governmental than supra-national and that enforcement mechanisms lack practical effectiveness necessarily means that the Member States themselves remain the masters of the Treaties, in keeping with the architect's compromise model.

²⁹ See Cases C-6/90 & C9/90, *Andrea Francovich and Another v. The Republic (Italy)*, *Common Market Law Reports* 2 (1993): 66-116; or *European Court Reports* (1991): I-5357-I-5418.

³⁰ Josephine Steiner, *Enforcing EC Law* (London: Blackstone Press, 1995), 12.

Hart's reasoning on the concept of sovereignty is particularly relevant to the present discussion. Explaining sovereignty, Hart states that "... the theory simply asserts that there could only be legal limits on legislative power if the legislator were under the orders of another legislator whom he habitually obeyed. . . . [T]he theory does not insist that there are no limits on the sovereign's power but only that there are no *legal* limits on it."³¹ Hence, within the United Kingdom, there are no legal limits on the actions of Parliament in the strictest of terms. However, Parliament has wilfully transferred an amount of its sovereignty to the Communities. The decisive point here lies in the fact that the United Kingdom might at any time leave the Communities. De Smith and Brazier note that:

The doctrine of parliamentary sovereignty has undoubtedly been changed, but it would fully revive in its traditional form if Parliament legislated to withdraw the United Kingdom from the European Community. For economic and political reasons it is most unlikely that Parliament would attempt to do that, but such a step would be effective in English law (although the European Court would probably hold that it was ineffective in Community law).³²

De Smith and Brazier's suggestion that Britain's exit from the Communities would be permissible according to English law--although problematic at the very least according to European law--is further considered by Bradley and Ewing. They suggest a myriad of complexities:

. . . what Parliament has legislated to achieve in the European Communities Act, it could undo by the simple process of passing a different Act. . . . In such an event, the problems raised would be as much political as legal; there would seem little point in wrangling over the legal niceties of the situation where there had in fact been secession.

³¹ Hart, 66.

³² Stanley de Smith and Robert Brazier, *Constitutional and Administrative Law*, 7th ed. (London: Penguin Books, 1994), 89.

More practical problems along the same lines would be posed if the UK Parliament decided in a particular instance to legislate in express defiance of Community law, whilst at the same time making clear its continued acceptance for the generality of cases of supremacy of Community law. The most difficult legal questions of all arise in the context of implied, rather than express, repeal. Logically, what can be repealed expressly must also, in some circumstances, be capable of implied repeal; the difficulty is to know in what circumstances such implied repeal occurs. In particular, would it occur where, after the entry into force of the European Communities Act, UK legislation was enacted which simply contradicted an already-existing provision of Community law? Would that be taken by the courts as an indication that Parliament's most recent intention was to deny supremacy to the Community law involved, so that the European Communities Act's provisions on this score would be impliedly repealed?³³

Thus, the fact that the British Parliament possesses the authority to withdraw from the European Communities necessarily illustrates that sovereignty ultimately resides at Westminster. This theoretically has a very significant impact on the Court's relationship with the United Kingdom. Practically speaking, however, factors such as reputation and credibility naturally bar withdrawal as a serious alternative except in the most grave circumstances. (Specifically, any Member State considering such behaviour risks a loss of credibility if its threats are not substantiated, leading to the loss of the threatening State's reputation for making credible threats if the behaviour persists over time.) Nonetheless, since withdrawal does exist as a possible option, the philosophical underpinnings of the concept of a sovereign have particular relevance. Hence, we turn to further examining the nature of a sovereign.

³³ Bradley and Ewing, 146.

Sovereignty: Some Preliminary Conclusions

By definition, there can be but one sovereign. On the surface, such an axiom appears problematic with regard to our reasoning. As a neofunctionalist would be correct to point out, the Court has issued decisions that have fundamentally changed the nature of the relationship between Member States and the European Communities, codifying into law the necessary measures for the completion of the broad designs of the Treaties. One might attempt to argue that such manoeuvring by the Court is evidence that the Member States no longer enjoy sovereignty. This research project disagrees, justifying its assumption that Member States still maintain their respective sovereignty based on Hart's reasoning. According to Hart, "... the order given by the subordinate will only rank as law if it is, in its own turn, given in pursuance of some order issued by the sovereign. The subordinate must have some authority delegated by the sovereign to issued orders on his behalf."³⁴ Following such reasoning, we turn to Colin Munro's analysis of the relationship between the Communities and Britain. Munro notes that "... the status of Community law in this country is a matter of constitutional law, not Community law, and here it does owe its force entirely to an Act of Parliament."³⁵ Because the source of the Communities' authority (at least in the United Kingdom) flows from an Act of Parliament, Westminster retains ultimate sovereignty despite the fact an element has been granted to the European institutions. Moreover, as there can

³⁴ Hart, 45.

³⁵ Colin R. Munro, *Studies in Constitutional Law* (London: Butterworths, 1987), 128.

be but one ultimate sovereign for a particular entity, the British Parliament continues to occupy this position based on the fact that the sheer authority it holds has not been surpassed by that of the Communities. Finally, the cornerstone of the British Constitution³⁶ allows Parliament to reserve the power to absolve the transfer of sovereignty, necessarily indicating that *Kompetenz-Kompetenz* remains at Westminster. Having briefly explained the related concepts of Parliamentary supremacy and sovereignty as they relate to the European Communities, it is now possible to examine the *European Communities Act 1972*--the legislation which enabled the accession of the United Kingdom to the Communities.

European Communities Act 1972

The United Kingdom entered the European Communities as a result of the *European Communities Act 1972*. In the legislation, the United Kingdom declared:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.³⁷

³⁶ Namely, Parliament cannot bind its successor.

³⁷ *European Communities Act 1972*, Part I, 2 (1).

To be sure, the British government had to adopt in full both the body of existing European law and the law that would emerge in the future. With regard to the Court, the British Government recognised that this meant the following:

For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).³⁸

Despite such a broad commitment to the Court, however, the United Kingdom has not always accorded to the ECJ unyielding co-operation or unwavering commitment, although the UK has shown considerable restraint in abiding by EC law.

It was through the *European Communities Act 1972* that the British Parliament embarked on a course which has dramatically altered the country's (unwritten) constitution. Adopting the act in full, the United Kingdom was able to reconcile its dualist approach to international law with the necessity to agree in advance to future provisions which might arise. On the surface, such a limitation on the sovereignty of Parliament appears problematic. However, as has been previously argued, Parliament is, in fact, capable of imposing limits on its own authority. Nevertheless, Parliament ultimately remains free to absolve itself of these commitments although practical considerations make this very unlikely. Illustrating this issue, Imelda Maher points out that "... the political belief is that Britain cannot afford economically to be outside the European

³⁸ Ibid., Part I, 3 (1).

Community therefore political and economic circumstances would have to be very different before Parliament would exercise its power to repeal the European Communities Act and with it its membership of the Communities.”³⁹

While expressing considerable disregard for the rule of law, Richard Crawshaw did express the opinion of more than an insignificant minority in the Commons debate on British membership in the Communities in his statement:

... insofar as there is a court, it is of course there to give decisions, but whether a country accepts a decision in the ultimate is a question of fact. Of course this must be so.

France signed the N.A.T.O. treaty. It decided not to keep forces within N.A.T.O. Was it bound to keep them there? Of course.

... sovereignty is a matter of power, and where power resides, is sovereignty. Whatever the issues are, ultimately it comes down to whether that country wishes to accept.⁴⁰

Conceding the legal problems posed by Crawshaw’s argument, in an extreme sense, Parliament does retain both theoretically and practically the authority to ultimately exit the Communities. This underlines the logic of modified preferences in that the Court’s decisions must be palatable to the Member States since they have the power to alter its authority. As the case studies of this research verify, despite the ECJ’s legal responsibilities, it cannot ignore the legal implications of its decision or it will risk losing legitimacy.

In examining the press in the months preceding British accession to the Communities, a fair assessment of the impact of membership was for the most

³⁹ Imelda Maher, “A Question of Conflict: The Higher English Courts and the Implementation of European Community Law,” *Implementing EC Law in the United Kingdom*, ed. Terence Daintith (Chichester: Chancery Law Publishing, 1995), 315.

⁴⁰ *House of Commons Official Report*, 27 October 1971, col. 1931.

part presented. There was little doubt in the press in 1972 over the potential impact that joining the Communities would have upon Britain's constitutional order. *The Times*, for example, on 18 April 1972 reported that "the present Bill [The European Bill] can and does make community law prevail over existing Acts of Parliament. It also expressly attempts to make it prevail over future Acts. . . ." ⁴¹ Moreover, it was certainly clear by 1973 that joining the European Communities would revolutionise British law. *The Times* reported in early January that "the treaty and its regulations contradict our domestic law time and again. How are the courts to cope with the contradictions? The answer is plain. If there is any conflict between a previous Act of our own Parliament and the treaty, then the provisions of the treaty will prevail." ⁴² Incidentally, such a clear understanding of the commitment of membership contrasts to the spillover logic of neofunctionalism.

Despite a transference of an element of sovereignty to the Communities, the British Parliament certainly did not transfer *Kompetenz-Kompetenz* as is evidenced by Article 3, Section 1, Part 1 of the *European Communities Act 1972*:

If Her Majesty by Order in Council declares that a treaty specified in the Order is to be regarded as one of the Community Treaties as herein defined, the Order shall be conclusive that it is to be so regarded; but a treaty entered into by the United Kingdom after the 22nd January 1972, other than a pre-accession treaty to which the United Kingdom accedes on terms settled on or before that date, shall not be so regarded unless it

⁴¹ H. W. R. Wade, "The Judges' Dilemma," *Times*, 18 April 1972, 14.

⁴² Lord Denning, "Every Resource and Skill Needed in Grafting New Laws on to the Old," *Times*, 2 January 1973, "Forward Into Europe," ii.

is so specified, nor be so specified unless a draft of the Order in Council has been approved by resolution of each House of Parliament.⁴³

Thus, the British Parliament reserved the authority to either approve or reject further treaties on European integration, thereby retaining sovereignty except in those limited fields specified by the Treaties approved by Parliament.⁴⁴ This necessarily meant that *Kompetenz-Kompetenz* remained with Westminster and was not transferred to the Communities. This further illustrates that Parliament is capable of exercising ultimate control over the Community's impact on the United Kingdom. As the historical and political background that surrounded Britain's entry into the Communities has been sketch, it is now appropriate to examine the architect's compromise model with regard to these circumstances.

The Architect's Compromise and British Entry

In reflecting over the events which led to the British accession, the architect's compromise model appears to conform well with the actual circumstances. First, these negotiations were characterised by bargaining in which the advantages and disadvantages of Community membership were carefully weighed as we have seen. Tom Boardman, summed up the House of Commons debate on British accession, stating that "it has been said throughout

⁴³ *European Communities Act 1972*, Section 1, Part 1.

⁴⁴ See E. C. S. Wade and A. W. Bradley, who note that:

"... the Court of Justice has explained that Community law achieves supremacy as a consequence of a *transfer* of legislative powers from the member states to the Community. . . . [I]t is beyond doubt that this has not been achieved by the European Communities Act 1972, albeit that the devices called upon in the Act go a long way. . . to safeguard the primacy of Community law as far as UK courts are concerned." (*Constitutional and Administrative Law*, 11th ed. [London: Longman, 1996], 145-146.)

the debate that this is a matter of personal judgment. It is a matter of weighing the advantages and disadvantages in the balance and deciding on which side to come down.”⁴⁵ The process of decision-making reflects a similar reliance on rationality and modified preferences as is assumed by the architect’s compromise model. While the model is built upon decision-making by the ECJ, it is nonetheless possible to examine the model’s assumptions with regard to Britain’s accession to the Communities. Hence, the following discussion will further justify the assumptions of the model through examining Britain’s decision to join the Communities.

In line with the logic underlying the architect’s compromise model, we can identify two major actors: the British Parliament and the ECJ. Although the decision to join the Communities was based on an assessment of the overall impact of the Communities on Britain, this research focuses on the Court, and we thus assume it to fill a role as a primary actor. Furthermore, at the time Britain joined the Communities, the Court had already laid the cornerstones of EC law--direct effect and supremacy--and thus, the British government joined the Communities with the knowledge that the Court held such significant authority.

While a host of actors both above and below the state was a factor in the debate over Britain’s accession to the Communities, Parliament alone decided that Britain would join the Communities. It should be stressed that this research

⁴⁵ *House of Commons Official Report*, 27 October 1971, col. 2009.

project is not concerned with the evolution of public opinion and the manner in which national governments arrive at decisions.⁴⁶ Rather, we are concerned with the manner in which the Court affects integration and the development of European law in the Member States. Therefore, it is possible to regard the United Kingdom as a single, solitary actor since the Government negotiated the terms of entry with a single voice and accepted membership in full for the country.

We also assume rationality in the behaviour of the actors. As was established previously, rationality implies that the actors have a set of goals, and their preferences are identified as the actions which appear to maximise their respective goals. Rationality, in this sense, does not imply that the actors have complete information. Choices, therefore, between preferences are made based on the knowledge to which an actor has access. Parliament's decision to join the Communities conforms to rational expectations since it represents the collective belief of Members of Parliament that membership would be in the best interests of Britain. As has been discussed above, the advantages of joining the Communities consisted of a wide range of arguments although the economic argument appeared to tip the scales in the direction of Membership.⁴⁷ Such reasoning was the result of thorough study, including a Government-

⁴⁶ For an analysis of the impact of domestic politics on the process of European integration, see Simon Bulmer, "Domestic Politics and European Community Policy Making," *Journal of Common Market Studies* 21, no. 4 (1983): 349-363.

⁴⁷ In reviewing the arguments of the "European Communities Debate" in Parliament, the issue of economics is often claimed as the decisive issue by a number of supporters (and challengers) alike.

commissioned "Economic Assessment,"⁴⁸ of the expected outcomes that joining the Communities would precipitate.⁴⁹ In the Government's White Paper of July 1971, the Government's conclusions on accession were presented:

. . . Her Majesty's Government are convinced that our country will be more secure, our ability to maintain peace and promote development in the world greater, our economy stronger, and our industries and people more prosperous, if we join the European Communities than if we remain outside them. The Government are also convinced--and this conviction is shared by the Governments of the present six members of the Communities--that British membership of the Communities will enhance the security and prosperity of Western Europe. The Government are satisfied that the arrangements for our entry agreed in the negotiations will enable us to adjust satisfactorily to our new position as members of the Communities, and thus to reap the full benefits of membership.⁵⁰

Hence, the Government concluded that given the prevailing circumstances at the time--and later a majority of Members of Parliament likewise concluded--that Britain's goals could best be met by joining the Communities.⁵¹

The events that led to Britain's accession appear to conform precisely to the logic of modified preferences as Parliament ultimately held that the benefits of membership were significant enough to transfer an element of its sovereignty. It is axiomatic to mention that in the years preceding the British accession,

⁴⁸ See *Britain and the European Communities: An Economic Assessment*, Cmnd. 4289 (February 1970).

⁴⁹ See, for example, Geoffrey Rippon et al., *Europe: The Case for Going In* (London: George C. Harrap and Co. for the European Movement, 1971), which consists of a series of essays outlining the particular economic, security and political advantages of joining as well as the positive effect membership would have upon democracy in the United Kingdom.

⁵⁰ Cmnd. 4715, 2.

⁵¹ With regard to the other primary actor--the Court--we assume that rationality, as is constant feature of the architect's compromise model. However, the decision to join the Communities was a national decision taken by the United Kingdom and it is problematic to gauge the rationality of the Court based on this particular event. Therefore, this section focuses on the United Kingdom instead of the Court.

opinion inside and outside Parliament was greatly divided on the supposed benefits of membership.⁵² In the Parliamentary debates themselves, John Biggs-Davison expressed the opinion of many supporters of entry both in the Government and in the Opposition in stating, "the terms. . . as set out in the White Paper are not perfect. They are, however, the best now obtainable."⁵³ Thus, the argument to join the Communities was tempered by modified preferences. Particularly, Britain was faced with ceding an element of its sovereignty, redirecting trading preferences away from the Commonwealth and towards the Communities, adopting common policies on agriculture and regional development and conforming to other requirements of the Communities in order to secure the economic and security gains of membership. As the final vote in the Commons concerning Britain's accession revealed, the majority in Parliament concluded that even with the disadvantages of joining the Communities, it was in Britain's best interest to seek membership. Hence, Parliament's modified preferences led Britain to accept the disadvantages of membership in order to gain the benefits. To refer back to the theoretical debate of this study, the accession of the United Kingdom appears to conform to the architect's compromise. Specifically, Britain surrendered its short-term and unbridled preferences and instead, evaluated membership with regard to modified preferences, believing that membership would bring greater economic and security benefits in particular. The expectation of such long-term interests made the transference of sovereignty palatable. Having examined these events

⁵² See, for example, "We have Waited Ten Years," *The Economist*, 8 May 1971: 14-15, and "Battle Positions," *The Economist*, 2 January 1971: 16-18.

⁵³ *House of Commons Official Report*, October 27, 1971, cols. 1994-1995.

that led to Britain's membership, we now turn to examining the incorporation of the doctrine of supremacy of European law into British law.

Acceptance of the Doctrine of Supremacy by the United Kingdom

Despite formal constructions, the principle of supremacy of European law was not practically accorded to the ECJ in the early years of British membership. Rather, acceptance came slowly in the form of a type of bargaining process. Specifically, Britain accepted the concept gradually as the ECJ interpreted the limits of prior Treaty agreements in cases such *Macarthys Ltd. v. Smith*,⁵⁴ *Garland v. BREL*,⁵⁵ *Marshall v. Southampton*⁵⁶ and the *Factortame* cases.⁵⁷ This, in fact, did constitute a revolutionary change in the authority of the British Parliament. It will be demonstrated, however, that such a change occurred because of modified preferences--a central assumption of the architect's compromise model--rather than from neofunctionalist logic. In *Marshall*, for example, the English Court was able to accept that national statutes should be interpreted with the assumption that they are not supposed to

⁵⁴ Case 129/79, *Macarthys Ltd. v. Wendy Smith*, *European Court Reports* (1980): 1275-1297.

⁵⁵ Case 12/81, *Eileen Garland v. British Rail Engineering Limited*, *European Court Reports* (1982): 359-376.

⁵⁶ Case 152/84, *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, *European Court Reports* (1986): 723-751; or *Common Market Law Reports*, 1 (1986): 688-713.

⁵⁷ Case 213/89, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. And Others*, *European Court Reports* (1990): I-2433-I-2475; and Case 221/89, *Regina v. Secretary of State for Transport ex parte Factortame Limited and Others (No. 2)*, *Common Market Law Reports* 3 (1990): 589-632.

conflict with European law.⁵⁸ Such reasoning is a clear break from according Parliament unfettered sovereignty. P. P. Craig points out that:

The courts are willing to allow Community law to take precedence over national law in the event of a clash between the two. They reach this result by the use of a strong rule of construction, the tenor of which is that the relevant national rule should, whenever possible, be read as not intending to be in conflict with Community law.⁵⁹

Craig goes on to cite the *Litster*⁶⁰ case as evidence of such an approach. Britain's piecemeal approach to recognising the supremacy of European law appears to conform to the logic of the architect's compromise model. To illustrate the strength of this assertion, three pivotal cases with regard to Britain's acceptance of the doctrine of supremacy--*Macarthys*, *Marshall* and *Factortame*--will be examined according to the architect's compromise model. The remainder of this chapter will consist of initial reviews of the facts of these cases followed by an analysis of each. Finally, the chapter will conclude with general remarks on the concept of supremacy and its reception by the United Kingdom.

Macarthys Ltd. v. Smith

Macarthys Ltd. v. Smith arose when Wendy Smith, an employee of Macarthys Ltd. in Wemby claimed that she had been discriminated against based on her sex. Mrs. Smith became the stockroom manager of the warehouse

⁵⁸ T. R. S. Allan, "Parliamentary Sovereignty: Lord Denning's Dextrous Revolution," *Oxford Journal of Legal Studies* 3, no. 1 (1983): 32.

⁵⁹ Craig, 241.

⁶⁰ House of Lords. *Litster and Others v. Forth Dry Dock and Engineering Company Limited*, *Common Market Law Reports* no. 2 (1989): 194-223.

on 1 March 1976, after the departure of the former manager. Although her predecessor received sixty pounds per week, Mrs. Smith's salary was fifty pounds per week. Mrs. Smith left her job on 9 March 1977.⁶¹

Claiming that the discrepancies in her salary and that of her predecessor violated the amended Equal Pay Act 1970 (Sections 1.1 and 2.a), Mrs. Smith brought suit against her employer in the Industrial Tribunal in London. On 27 June 1977, the Tribunal upheld Mrs. Smith's claim, and Macarthys Ltd. subsequently appealed to the Employment Appeal Tribunal, which rejected the appeal on 14 December 1977. Macarthys Ltd. then appealed to the Court of Appeal, Civil Division, of the Supreme Court of Judicature, which appealed to the European Court of Justice under Article 177 for a preliminary ruling.⁶²

According to Lawrence Collins:

The short point was whether the Equal Pay Act 1970, as amended by the Sex Discrimination Act 1975, applied only where men and women were employed *contemporaneously* at different rates of pay, or whether it was broader in scope and applied in particular to a man and a woman employed in succession. Lord Denning thought that the Equal Pay Act was not limited to men and women working contemporaneously, but Lawton and Cumming-Bruce LJ thought that it was. As a result the court thought there was a potential conflict between the legislation and art 119 of the EEC Treaty and art 1 of the first Council Directive on equal pay [75/117]. . . .⁶³

While Lord Denning was unconvinced of the argument concerning contemporaneous work, his comments regarding the supremacy of Parliament are pertinent to the discussion at hand. Specifically, Lord Denning stated:

⁶¹ *Macarthys v. Smith* (ECR), 1277.

⁶² *Ibid.*, 1277-1278.

⁶³ Lawrence Collins, *European Community Law in the United Kingdom*, 4th ed. (London: Butterworths, 1990), 32.

Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.⁶⁴

Hence, it is obvious that Lord Denning did not accord EC law a higher authority than that of the British Parliament itself. However, Lord Denning further acknowledged that such a blatant attack on the Community by Britain was unlikely, and in *Macarthys*, he “assume[d] that the United Kingdom intended to fulfil its obligations under art 119.”⁶⁵ Given the uncertainty surrounding the case, the Court of Appeal requested a preliminary ruling from the ECJ in which the Civil Division asked if the principle of equal pay for equal work was contained in Article 119 of the EEC Treaty and in subsequent legislation.⁶⁶ The Court of Appeal further inquired of the nature of the principle of equal pay for equal work and asked if the Council Directive on the issue is directly applicable to Member States.⁶⁷

In the proceedings before the Court, Mrs. Smith, the United Kingdom and the Commission all submitted arguments. Mrs. Smith argued that legislation from Britain and Communities, including the Equal Pay Act 1970, the Sex Discrimination Act 1975 and Article 1 of Council Directive 75/117/EEC,⁶⁸

⁶⁴ English Court of Appeal. *Macarthys Ltd v. Smith*, *All England Law Reports* 3 (1979): 329.

⁶⁵ *Ibid.*, 329.

⁶⁶ Specifically, Article 1 of the EEC Council Directive of 10 February 1975 (75/117/EEC). See *Official Journal of the European Communities* vol. 18, L 45 (19 February 1975).

⁶⁷ *Macarthys v. Smith* (ECR), 1278.

⁶⁸ Council Directive 75/117/EEC.

prohibited sexual discrimination. Further, Mrs. Smith and the Commission both argued that Article 119 of the EEC Treaty guaranteed equal pay for equal work even in situations when women or men are contemporaneously working in the same position. With regard to contemporaneous employment, the Commission noted that "such a qualification is justified neither by the purpose nor the language of the texts, is not supported by the case-law and has no foundation in common sense or policy."⁶⁹ In contrast, the United Kingdom argued that neither Article 119 nor Article 1 of the directive are sufficiently specific or precise to give rise to direct effect, and thus, the United Kingdom argued that the "implementation [of the directive] is a matter for national legislation."⁷⁰

Here again, it appears that modified preferences determined the actions of the United Kingdom. T. C. Hartley has explained that "... in practice priority will be given to Community law: in view of the high degree of party discipline in the House of Commons, it is unlikely that Parliament would repudiate the Treaties unless the Government had decided on such a course of action."⁷¹ While recognising Parliament's sovereignty to override the European Communities Act 1972 and subsequent legislation, it appears Britain forgoes this temptation in order to ensure a well-functioning Community. Hence, the architect's compromise model with its emphasis on modified preferences offers a useful explanation of the relationship between the Court and the United Kingdom. Specifically, the United Kingdom voluntarily agreed to transfer its

⁶⁹ *Macarthys v. Smith* (ECR), 1283.

⁷⁰ *Ibid.*, 1283.

⁷¹ T. C. Hartley, *The Foundations of European Community Law*, 2nd ed. (Oxford: Clarendon Press: 1988), 243-244.

absolute authority in legislative matters in return for membership in the Communities.

Upon review by the European Court of Justice, Mrs. Smith was found to have suffered discrimination based on her sex. Citing the *Defrenne*⁷² judgement--a case which well illustrates the Court's piecemeal approach and increasing influence, the Court argued that Article 119 applied directly "without the need for more detailed implementing measures on the part of the Community or the Member States,"⁷³ and thus, "the principle that men and women should receive equal pay for equal work. . . is not confined to situations in which men and women are contemporaneously doing the equal work for the same employer."⁷⁴ Furthermore, the Court held that the dispute could be decided solely by Article 119 and therefore, did not give a judgement on other legislation which had been mentioned in the proceedings.⁷⁵

When the case was returned to the Court of Appeals, the British Court accepted the ECJ's ruling and accordingly determined that Mrs. Smith had, in fact, suffered discrimination. In the judgement of the English court, Lord Denning explained precisely the events that led to Britain acquiescing to the supremacy of the ECJ:

The majority of this court felt that Article 119 was uncertain. So this court referred the problem to the European Court at Luxembourg. We have now been provided with the decision of that Court. It is important

⁷² Case 43/75, *Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, *European Court Reports* (1976): 455-493.

⁷³ *Macarthys v. Smith* (ECR), 1288.

⁷⁴ *Ibid.*, 1289.

⁷⁵ *Ibid.*, 1290.

now to declare--and it must be made plain--that the provisions of Article 119 of the Treaty of Rome take priority over anything in our English statute on equal pay which is inconsistent with Article 119. That priority is given by our own law. It is given by the European Communities Act 1972 itself. Community law is now part of our law: and, whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it.⁷⁶

Recognising the primacy of European law in the limited competencies delegated to the European Communities by the Member States, the English court accepted that Article 119 was not restricted to employees who worked at the same time in an equal capacity.

The Architect's Compromise and *Macarthys*

With regard to the architect's compromise model, the case is relatively simple. We begin with the actors: in *Macarthys*, Mrs. Smith, the UK and the Commission all lodged submissions to the ECJ. Despite Mrs. Smith's role in bringing the case to the attention of the Court, and hence, helping to fill in the gaps of the Treaty, the parameters of the decision were established much earlier when Article 119 was drafted by the Member States. By joining the Communities, the United Kingdom chose to abide by these regulations. The Commission was instrumental in that it vocalised Community preferences at large; however, it did not have a role in the actual decision-making process. Thus, we assume the primary actors to be the Member States (in this case Britain) and the Court itself.

⁷⁶ English Court of Appeal. *Macarthys*, CMLR, 218.

As is a feature of the architect's compromise model, we assume the rationality of the actors. In the case of the United Kingdom, it is clear from Lord Denning's initial comments that Britain would prefer to retain the unfettered sovereignty of Parliament. However, the benefits of membership in the Communities compensated for the loss of this particular national authority as will subsequently be demonstrated with regard to modified preferences. With respect to the Court, we have previously established that the term rationality refers to the ECJ's purposeful action in achieving the goals of the Community as set out by the Treaties. In *Macarthys*, the Court relied on a teleological approach to the Treaties as to afford a more liberal interpretation of Article 119, which ensured the supremacy of European law over British domestic law.

With respect to modified preferences, the Court appeared rather unconcerned about a possible conflict with regard to its argument for the supremacy of European law. However, *Macarthys* does actually represent a logical point in the development of the concept of supremacy begun in *Costa* and *Van Gend en Loos*; given that the Member States had accepted these revolutionary decisions dealing with supremacy, the Court most likely judged that a decision that further bolstered supremacy of European law likewise would be accepted. In terms of the architect's compromise model,⁷⁷ we can assume that that modified preferences of the Member States as represented by the state of nature could be represented by m_1 , given that the Member States had relatively pro-integration sentiments. Weiler confirms the assumption that the

⁷⁷ Please refer to the appendix following chapter 8 for a review of the architect's compromise model.

Macarthys decision was taken in a period receptive to further integration, noting that "the expansion of Community jurisdiction in the 1970's and early 1980's was. . . willed by all actors involved."⁷⁸ In terms of the action of the Court, the decision in *Macarthys* is clearly represented by a_1 since the case represented a distinct move towards further integration as the Court further secured the integrity of the Communities. From the architect's compromise model, we thus expect outcome o_1 , or acceptance by the Member States and a resulting deepening of integration, which is exactly what did occur.

In terms of the reception of the case by the United Kingdom, the architect's compromise model proves a reliable model for illustrating the ECJ's role in the process of European integration. *Macarthys Ltd. v. Smith* represents an early victory for European law and illustrated that courts in the United Kingdom were bound to comply with Community law despite Lord Denning's initial assumption that an intention of Parliament to repudiate the Treaty should guide national court decisions. As described above in this analysis and famously elsewhere,⁷⁹ the English Court did accept the authority of the ECJ based on the fact that the legislation establishing Britain's membership in the Communities was actually an Act of Parliament itself. Therefore, it is clear that ultimate sovereignty still theoretically lies with Parliament: the *European Communities Act* transferred authority to the Communities but is also subject to repeal. T. R. S. Allan describes this with great clarity:

⁷⁸ J. H. H. Weiler, "The Transformation of Europe," *Yale Law Journal* 100 (1991): 2435.

⁷⁹ See Allan, 22-33.

. . . it must be admitted, the judgments, though significant, hardly look revolutionary. They expressly affirm the ultimate sovereignty of the contemporary Parliament. . . . Indeed, the reasoning is essentially that, in according priority to Community law, the court was giving effect to Parliament's (present) intention. The object of the Equal Pay Act was to implement the United Kingdom's obligations under the Treaty of Rome to ensure the equality of the sexes in terms and conditions of employment. Parliament could not, therefore, have intended there to be any conflict or incompatibility between the United Kingdom statute and Community law.⁸⁰

Additionally, Evelyn Ellis, through demonstrating that express and implied repeal of the *European Communities Act* are both legal, illustrates that Parliament still exhibits a de facto authority over the Court. Hence, Britain was able to both accept the authority of the Court and continue to respect the concept of Parliamentary sovereignty.

Marshall

While previous European Court cases illustrated the ability of the Court to interpret in a manner to accord formidable steps to further integration, the legal reasoning of *Marshall v. Southampton* stands as an example of possible judicial restraint. Such restraint is a reflection of greater appreciation of stricter modified preferences of the Member States, therefore allowing the Court less freedom to issue overtly integrationist decisions. While *Marshall* was essentially a case of conflict between domestic law and Community law, and thus a question of legal supremacy, perhaps the most interesting facet of the

⁸⁰ Ibid., 28-29.

decision surrounded the Court's reasoning on direct effect. A summary will lay the foundation for analysis of the case's impact on European integration.

The facts of the case are straightforward. Until 31 March 1980, Miss M. H. Marshall was employed by the Southampton and South West Hampshire Area Health Authority. Although Miss Marshall was physically capable and willing to continuing working, her employment was terminated shortly after reaching the age of 62. This termination was due to her employer's policy of observing a normal retirement age of 65 for men and 60 for women; Miss Marshall worked until the age of 62 as a result of an earlier exemption, which was later withdrawn. Based on her loss of job satisfaction and income, Miss Marshall brought proceedings against her employer before the Industrial Tribunal, arguing that Southampton breached section 6 (2) (b) of the Sex Discrimination Act, 1975. The Tribunal held that section 6 (4) of the Sex Discrimination Act was in violation of Article 5 (1) of the Equal Treatment Directive since the national act excluded retirement from the types of activities which constitute discrimination while the directive granted equal working and dismissal conditions without regard to sex. After an appeal by the Health Authority, the Employment Appeal Tribunal--while agreeing that Southampton's employment policy which distinguished between the sexes with respect to retirement ages was in conflict with Article 5 (1)--found that the Industrial Tribunal did not have the authority to rule that the act was overridden by the directive. The case was then referred to the European Court of Justice by the Court of Appeal. In its request for a preliminary ruling, the Court of Appeal asked if Miss Marshall's dismissal constituted discrimination as

prohibited in the Directive 76/207, and if in the affirmative, whether Miss Marshall could rely on this directive despite any inconsistency between it and the Sex Discrimination Act 1975.⁸¹

In the proceedings before the Court, Miss Marshall, the Commission, the Southampton Health Authority and the UK all submitted statements. Miss Marshall asserted that she had experienced discrimination based on her age as prohibited by the Sex Discrimination Act 1975 and Directive 76/207. Discounting the conflict between Article 5 (1) of the Directive and section 6 (4) of the Sex Discrimination Act, Miss Marshall argued that when domestic law is in conflict with Community law, national courts are obliged to rule in such a manner as to conform to the latter. Supporting Miss Marshall, the Commission maintained that the judgement by the English courts with regard to Section 6 (4) of the Sex Discrimination Act was in conflict with the directive. In contrast, the Southampton Health Authority and the UK argued that Miss Marshall's dismissal did not constitute an act of discrimination based on Article 7 (1) of Directive 79/7, which permits individual Member States to determine their particular regulations with regard to the age at which one is entitled to retirement and old age pensions. The Southampton Health Authority and the UK justified their reasoning, citing the Court's ruling in *Burton*,⁸² in which the Court approved a voluntary retirement scheme which applied a different age threshold for men and women. The Southampton Health Authority and the UK

⁸¹ *Marshall v. Southampton* (ECR), 738-740.

⁸² Case 19/81, *Arthur Burton v. British Railways Board*, *European Court Reports* (1982): 555-592.

further argued that the directive was not capable of direct effect, and moreover, that an unimplemented directive could not be relied upon by one individual against another individual. Arguing that the state--when acting as an employer--should be treated as a private employer since to do otherwise would constitute discrimination between private and public employers, the state was thus not liable despite its failure to give effect to the directive.⁸³

Following the advice of the Advocate General, the Court ruled that Miss Marshall had suffered discrimination based on her sex and that Directive 76/207 took direct effect notwithstanding the arguments by Southampton Health Authority and the UK with regard to the reasoning in the *Burton* case. The judgement is particularly interesting in that the Court not only addressed the specific legal difficulty of the case before it but also expounded that directives cannot have horizontal effect according to Article 189 of the EEC Treaty. Specifically, the Court declared that directives are only binding on Member States and not on individuals. Thus, one may rely upon a directive in a claim against a recalcitrant Member State but not against an individual. The Court justified this position by noting that first, such a situation did not discriminate against those either publicly or privately employed since individuals in both cases are able to rely on the directive against a recalcitrant Member State, and second, this logic was designed to disallow a Member State from benefiting from failure to enact a directive (the doctrine of estoppel).

⁸³ *Marshall v. Southampton* (ECR), 743-748.

While the Court has developed alternative remedies for individuals suffering a loss as a result of a recalcitrant Member State,⁸⁴ the case itself represents a cautious move by the Court. Given the Court's unsolicited preclusion of horizontal direct effect as a principle in European law, the *Marshall* case closely conforms to the assumptions of the architect's compromise model. To begin, while Miss Marshall, the Commission, the Southampton Health Authority and the British Government all submitted arguments before the Court, it is more useful to examine the case with regard to the Member States of the Communities and the Court itself. First, Miss Marshall and the Commission can be regarded as representing the argument for further integration. As has been argued previously, the plaintiff in the cases before the ECJ is significant to the extent that he or she brings the unsettled legal issue to the attention of the Court for clarification; however, he or she does not affect the scope of integration to which the Member States have committed themselves and to which the Court exists to ensure: Miss Marshall, thus, served as such a conduit. While the Commission certainly played a significant role in arguing the case for the Communities at large, it had the authority neither to make the final decision nor to set the general guidelines for integration as outlined in the Treaties. Both the UK and the Southampton Health Authority argued a case for less integration since they essentially wished to avoid the requirements of Directive 76/207. As with Miss Marshall, Southampton was a factor in the case but devoid of any decision-making

⁸⁴ Jason Coppel, "Rights, Duties and the End of *Marshall*," *Modern Law Review* 57 (November 1994): 861-862.

authority. In this particular case, we can effectively collapse Southampton with the British position since the two entities shared largely the same legal arguments and the Court itself recognised Southampton “to constitute an organ of the state.”⁸⁵ The particular legal discussions that resolved the difficulty in *Marshall* is a matter of legal theory, while the architect’s compromise examines the progress of European integration and the acceptance of law by the Member States. Hence, the individuals in the court proceedings are incidental to the scope of integration to which Member States have pledged themselves and of which the Court must interpret. In contrast, we identify the primary actors as the Court and the Member States (in this case, the United Kingdom although the Court did consider the ramifications of its decision with regard to the Member States at large).

As with the initial assumption of the Member States and the Court being the primary actors, the assumption of rationality of the actors is a constant in the architect’s compromise model: the situation in *Marshall* appears to verify this rationality assumption. To begin, the British Government’s submissions to the Court demonstrate rationality in two respects. First, Britain deliberately chose to oppose Miss Marshall’s argument that she had suffered from discrimination. The justification for this position can be found in the anticipated financial burden that the United Kingdom might face should Miss Marshall win the case. Evidence of this burden is apparent in the *Financial Times*’s report on the day following the ruling with estimates as high as £2.5 billion per year in the event

⁸⁵ Coppel, 861.

that the retirement age for both sexes was lowered to 60, and over £500 million if the retirement age for both sexes was set at 63.⁸⁶ Second, Britain chose to support the argument that the Southampton Health Authority should be considered a private employer. Such a tactic was designed to relieve the Government from responsibility of the actions of the Southampton Health Authority since the Government further maintained that private individuals were not liable when a Member State had failed to implement a directive. Likewise, the Court itself played the part of a rational actor. (As can be recalled, this assumption is held constant for the Court according to the model.) Since the Court's ruling draws a distinction between public and private employers, it has been argued that the Court's reasoning regarding direct effect in the *Marshall* case "appears to be an abdication of the responsibility of the Community with respect to rights arising under Community legislation and may set a dangerous precedent for the future. . . [and] flies in the face of the *Van Gend en Loos* judgment. . . ."⁸⁷ However, as an analysis of the Court's strategic manoeuvres will demonstrate, the Court pursued purposeful actions--although not openly aggressive attempts at further integration--which would be the most tolerable course given the constraints of the Member States' modified preferences.

Corresponding to the architect's compromise, the Court played the part of a strategic actor. In terms of the legal issues involved in the case, the Court was clearly convinced of the validity of Miss Marshall's claim. As will be

⁸⁶ "Ruling on retirement age set to affect public sector workers," *Financial Times*, 27 February 1986, 1.

⁸⁷ Nigel Foster, "Equal Treatment and Retirement Age," *European Law Review* 11, no. 3 (1986), 228.

described below, "even commentators who support the reasoning behind *Marshall* recognize that the decision was largely shaped by political realities,"⁸⁸ and some would argue that "the formal legal justifications given in *Marshall* are unconvincing."⁸⁹ Thus, it is the precise reasoning of the Court regarding direct effect which best illustrates the strategic actions of the Court. Specifically, Coppel notes that in the body of its case law prior to *Marshall*, the Court has formulated its most important decisions based on "a teleological method of legal reasoning and 'une certaine idée de l'Europe.'"⁹⁰ However, "the real explanation for continuing denial of horizontal direct effect for directives may well be found in the field of politics rather than law," as is suggested by the hostility of French and German national courts, in particular, towards "the initial decision to confer direct effect upon directives."⁹¹ Since EC law relies on the goodwill of the national courts given their responsibilities both to appeal for preliminary rulings under Article 177 (EEC) and to respect decisions from the ECJ, the Luxembourg Court must be cognisant of the fact that hostility from these national courts in response to its decisions could result in a loss of legitimacy of EC law as national courts simply refuse to acknowledge such decisions. Hartley recognises the ECJ's strategic actions in noting:

... one would have thought that the Court's policy of enhancing the effectiveness of Community law would have led it to come down in favour of horizontal direct effect. If the question had arisen for decision

⁸⁸ Robert Scarborough, "Directives and the Doctrine of Direct Effect: A Critique of *Marshall v. Southampton Area Health Authority*," *The University of Chicago Legal Forum: Europe and America in 1992 and Beyond: Common Problems. . . Common Solutions?* (1992): 333.

⁸⁹ P. E. Morris, "The Direct Effect of Directives--Some Recent Developments in the European Court-II," *Journal of Business Law* (July 1989): 313.

⁹⁰ Coppel, 863.

⁹¹ *Ibid.*, 878.

ten years earlier, this might well have been the result; but since then two national courts of considerable influence, the French *Conseil d'Etat* and the German *Bundesfinanzhof*, have rebelled against the whole idea. . . . This was obviously a serious matter and, while the European Court refused to retreat from the position it had adopted, it probably considered it expedient not to press on any further. The denial of horizontal direct effect to directives can, therefore, be seen as an offer of a compromise under which the European Court will limit the direct effect of directives to vertical direct effect if national courts will accept it to that limited extent.⁹²

Hence, the Court, as a strategic actor, realised the limits of its authority and refrained from pursuing an issue that might cause rebellion among the Member States. Coppel also notes the opposition by the Member States, stating that "there is no doubt that the feeling amongst the Member States remains overwhelmingly against horizontal direct effect for directives."⁹³ Hence, the Court faced the predicament of granting direct effect to directives for private individuals which would conform to the Court's preference for further integration. By doing so, however, the Court would risk losing legitimacy with national courts and governments: the compromise on this issue illustrates the Court's ability to strategically weigh both its preferences and potential outcomes to determine the optimal position to adopt. Given the cumbersome and uncharacteristically restrained reasoning of the Court in the case and appreciating the political factors facing the Court, the ECJ's judgement appears to be a result of strategic manoeuvring: namely, the Court gauged the opposition by the Member States to be significant enough to issue a restrained judgement.

⁹² Hartley, 209.

⁹³ Coppel, 878.

Similarly, the Court demonstrated a clear appreciation for modified preferences in its restrained approach to *Marshall*. As has been mentioned in the discussion of the Court as a strategic actor, the Court was constrained in the political realities outside the courtroom. Robert Scarborough argues that “much of the direct effect jurisprudence preceding *Marshall* suggested that the ECJ might have applied the direct effect doctrine to directives to the same extent that it covers provisions of the Treaty.”⁹⁴ However, as has been discussed above, the Court did not rule accordingly; Christopher Greenwood explains the constraining factors conditioning the ECJ’s decision in the case:

The European Court is dependent upon the co-operation of the national courts and its restraint in *Marshall* may encourage the more recalcitrant national tribunals to accept its earlier decisions on the direct effect of Directives. Reassuring the national governments and their electorates that individuals would not be bound by unimplemented Directives (which do not even have to be published) may also have assisted in persuading the national parliaments to ratify the Single European Act. . .
⁹⁵

Recognising that the Court might antagonise “national sensitivities if it insist[ed] on deepening the impact of Community law in the national legal order,”⁹⁶ the ECJ instead restrained its unbridled preference for further integration and issued a compromise which would be palatable to sceptical Member States. In terms of the architect’s compromise model, the Court’s action could be represented by a_3 (action against further integration) since the legal reasoning represented a retreat from earlier case law as is described above. It is true, as in the words of

⁹⁴ Scarborough, 321-322.

⁹⁵ Christopher Greenwood, “Directives--Time to Retire,” *The Cambridge Law Journal* 46, no. 1 (1987): 11.

⁹⁶ Stephen Weatherill, *Cases and Materials on EC Law*, 3rd ed. (London: Blackstone Press, 1992), 92.

Anthony Arnall, that "the Court attempted to sugar the pill with its statement that provisions contained in directives which were sufficiently clear and precise could be enforced against Member States irrespective of the capacity in which they acted."⁹⁷ However, denying horizontal direct effect to directives represents a restrained action by the Court, underlining the importance that its decisions conform to modified preferences. Morris further describes the dilemma which the Court faced:

If the Court develops its case-law in disregard of national fears it will be faced with a loss of authority and legitimacy. Once this process is under way the effectiveness of Community law is jeopardised, since observance of Community law on the national plane rests on the co-operation and goodwill of the national courts, both in properly applying rulings by the Court and making proper use of the preliminary reference procedure.⁹⁸

Hence, by foregoing the short-term possible benefits of a broader interpretation of direct effect--although such an act might have seriously risked the legitimacy of the Court--the ECJ ensured a more amicable reception by the Member States as will be demonstrated below. In the long term, however, the approach taken by the Court might lead to confusion among the Member States as to the legislation required to satisfy the Equal Treatment Directive.⁹⁹

The decision in *Marshall* was accepted by the Member States. In Britain, the 1986 Sex Discrimination Act ended sex discrimination with regard

⁹⁷ Anthony Arnall, "The Direct Effect of Directives: Grasping the Nettle," *International and Comparative Law Quarterly* 35, no. 4 (October 1986): 944.

⁹⁸ P. E. Morris, "The Direct Effect of Directives--Some Recent Developments in the European Court--II," *Journal of Business Law* (July 1989): 314.

⁹⁹ Gina L. Ziccolella, "Marshall II: Enhancing the Remedy Available to Individuals for Gender Discrimination in the EC," *Fordham International Law Journal* 18, no. 2 (December 1994): 680-681.

to retirement age.¹⁰⁰ Weatherill describes both the process the Court might have undertaken in reaching its decision in *Marshall* and the payoff the Court received from conforming to modified preferences:

Probably the Court was concerned to strike an indirect package deal with national courts. It showed itself prepared in *Marshall* to recognize the limits of the Treaty and of its own interpretative role; it set a boundary to the spread of direct effect. In return for such clarification and such restraint it hoped to gain from the national courts an acceptance of that more restricted notion of direct effect--against the state alone. The tactic seems largely to have worked.¹⁰¹

Hence, we can assume that the state of nature, which is reflective of the modified preferences of the Member States, could be represented by m_3 (the Member States are hostile towards further integration) based upon the arguments above. Combining this state of nature with the action of the Court, a_3 , we anticipate that the outcome would be represented by o_9 (accepting the decision), which was exactly the response of the Member States to the ruling. Hence, the architect's compromise model does appear useful for explaining *Marshall's* impact on European integration. Moreover, the model once again provides a meaningful tool to depict the manner in which European law is incorporated into the domestic law of the Member States.

¹⁰⁰ For explanation, see Eric Short, "Retirement ages made uniform," *Financial Times*, 7 November 1987, 5.

¹⁰¹ Stephen Weatherill, *Law and Integration in the European Union* (Oxford: Clarendon Press, 1995), 124.

Factortame

Before testing the case against the architect's compromise model, a review of the facts in *Factortame* will allow for a further discussion of its importance in the British acceptance of European law. The case grew out of the British government's replacement of the Merchant Shipping Act 1894 with the Merchant Shipping Act 1988 in response to the EEC common fishing policy to prevent over-fishing. The 1988 act aimed to reduce the number of ships which would be considered as part of Britain's quota, thereby protecting British fishing interests. To this end, the new act required that the owners or shareholders of the fishing vessels either hold British citizenship or reside in the United Kingdom. As a result of the new act, ninety-five vessels which had been registered as British under the older act did not meet the criteria for registration owing to the fact that their directors were Spanish nationals. These companies thus challenged the British law, claiming that it contradicted European law with respect to Articles 7, 52, 58 and 221 of the EEC Treaty.¹⁰² After being brought before the High Court of Justice, Queen's Bench Division on 16 December 1988, the English court appealed to the ECJ for a preliminary ruling on 10 March 1989, in which the English court sought advice on the impact of Community law on the registration conditions for ocean-going vessels, especially in light of "the principle of non-discrimination on grounds of nationality, the right of establishment and the requirement of proportionality."¹⁰³

¹⁰² *Factortame*, No. 2 (CMLR), 595-596.

¹⁰³ *Ibid.*, 596-597.

In the proceedings before the Court, the United Kingdom, Ireland, the fishing companies and the Commission all lodged statements. According to the United Kingdom, Acts of Parliament are assumed to be compatible with Community law until proven otherwise. While courts do have the power to “quash the acts of public authorities” which conflict with Community law, British courts cannot annul an Act of Parliament except according to Article 2 (1) and (4) of the *European Communities Act 1972*, and in which “the matter is finally determined and not for the grant of interim relief.”¹⁰⁴ The United Kingdom further pointed out that such conventions regarding interim relief are not discriminatory since they apply equally to domestic and Community law, and that the impossibility of interim relief was precluded by public policy issues. Along with Ireland, the United Kingdom argued that the ECJ’s decision in *Rewe v. Hauptzollamt Kiel*¹⁰⁵ recognised that “the concept of direct effect of certain Treaty provisions cannot create new remedies in national law.”¹⁰⁶ Noting “that they have never suggested that in the ordinary event the grant of interim protection should be mandatory,”¹⁰⁷ the fishing companies argued their particular case was a special request for interim relief, reasonable given the possible financial devastation they could incur in its absence. In citing the reasoning in *Simmenthal*,¹⁰⁸ the appellants maintained that “. . . any provision of a national legal system and any legislative, administrative or judicial practice which may impair the effectiveness of Community law by withholding from the

¹⁰⁴ *Factortame* (ECR), I-2439-2440.

¹⁰⁵ Case 158/80, *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v. Hauptzollamt Kiel*, *European Court Reports* (1981): 1805-1856.

¹⁰⁶ *Factortame* (ECR), I-2441. For the reasoning of Ireland, see I-2442-2243.

¹⁰⁷ *Factortame* (ECR), I-2443.

national courts the power to give appropriate protection is itself incompatible with Community law. . . ."¹⁰⁹ Moreover, the appellants maintained that a request for a preliminary ruling "is rendered pointless" since the assumption of compatibility precludes the court from safeguarding the interests of the party before the court *until* the ECJ has issued a ruling.¹¹⁰ The Commission argued in favour of granting the appellants interim relief based on a comparison of national approaches to interim relief, on the possibility of suspension contained in Article 185 of the EEC Treaty and on the basis of the principle of effectiveness.¹¹¹

A clear victory for European law, *Factortame* "strikingly reinforced" the supremacy of European law.¹¹² Aidan O'Neill argues that the *Factortame* cases led to the judicial review of Parliament by national courts, which thus translates into the fact that the British Parliament is held to abide by its commitments under the Treaties or risk being reprimanded by its own national courts.¹¹³ The Court ruled that:

. . . the full effectiveness of Community law would be . . . impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those

¹⁰⁸ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, *European Court Reports* (1978): 629-657.

¹⁰⁹ *Factortame* (ECR), I-2443.

¹¹⁰ *Ibid.*, I-2444.

¹¹¹ *Ibid.*, I-2445-I-2447.

¹¹² Michael Binyon, "Landmark Ruling Gives EC Power over UK Law," *Times*, 20 June 1990, 24.

¹¹³ Aidan O'Neill, *Decisions of the European Court of Justice and Their Constitutional Implications* (London: Butterworths, 1994), 48-49.

circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.¹¹⁴

The Times suggested that the Court was aware that the judgement “would raise hackles in Britain.”¹¹⁵ However, closer scrutiny of the case reveals, as Jay J. Aragonés demonstrates, “a willingness of the Court of Justice to allow the United Kingdom to adhere to its traditional view of Community law precedence.”¹¹⁶ Specifically, the same “interpretative” method which British courts have adopted by which Acts of Parliament are assumed to conform to the European Communities Act 1972 can allow national courts “to disapply an act of Parliament at an earlier stage.”¹¹⁷ *Factortame* hence represents an aggressive step by the Court to clarify European law, which led to further integration and conforms to the architect’s compromise model as will be demonstrated below.

The Architect’s Compromise and the *Factortame* Case

To begin, we recognise the Court and Britain as the primary players in the case. As has been previously argued, despite a number of other actors (including the Commission, the Spanish fishing companies and Ireland), the entities which actually took the decisions that led to further integration were the Member States and the Court. Likewise, we assume these actors to be rational, as is a primary assumption of the architect’s compromise model. To review,

¹¹⁴ *Factortame* (ECR), I-2474.

¹¹⁵ Binyon, 24.

¹¹⁶ Jay J. Aragonés, “*Regina v. Secretary of State for Transport ex Parte Factortame Ltd.: The Limits of Parliamentary Sovereignty and the Rule of Community Law*,” *Fordham International Law Journal* 14 (1990-1991): 781.

¹¹⁷ Aragonés, 811-813.

rationality in this context simply means that we assume that the actors took those actions which appeared to maximise their respective utility.

We further assume the Court to be a strategic actor. *Factortame* represents one of the fundamental steps the Court of Justice has taken to enhance European law, applying its teleological approach to the Treaty. As the Court has found that European law must be enforceable before national courts and take precedence over all types of national law—including constitutional--delegated to the Communities by the Treaties, the case represents a logical step for preventing injury to parties who might suffer unjustly in the absence of such interim protection.¹¹⁸ Hence, “. . . the *Factortame* ruling emphasizes the Court’s commitment to building the principle of effectiveness.”¹¹⁹ Specifically, the ECJ, “invoking its previous case law that no law of the Member States should compromise the full effectiveness of Community law,” found that courts should not allow national laws to preclude interim relief.¹²⁰ While the Court did rule in a manner to enhance the effectiveness of Community rights, its ruling appeared conscious of the necessity to avoid creating a new legal remedy. Nevertheless, by ruling that a lack of interim relief was inconsistent with European law, the Court appears to have required a new legal remedy, albeit de

¹¹⁸ Robert Lane, “Interim Suspension of Acts of Parliament: The Armada Returns,” *Journal of the Law Society of Scotland* 35, no. 8 (August 1990): 311.

¹¹⁹ Weatherill, *Law and Integration in the European Union*, 120. Weatherill defines the doctrine of effectiveness as follows:

“This [the principle of effectiveness] requires national courts to adjust, perhaps even to create national procedures in order to secure effective protection of EC law rights. Article 5 ‘effectiveness’ is a manifestation of the capacity of principles of Community law to intrude into what might initially appear to be areas of reserved national competence.” (Weatherill, 120)

¹²⁰ D. Lasok and K. P. E. Lasok, *Law and Institutions of the European Union* (London: Butterworths, 1994), 363.

facto.¹²¹ Such a paradox of issuing a strong ruling but refusing to clarify its actual implications illustrates the Court's role as a strategic actor and will be discussed more fully with regard to modified preferences below.

In *Factortame*, the reasoning of the Court appeared to conform to modified preferences since the Court refrained from a more aggressively integrationist ruling and instead provided one more palatable to the Member States. As has been presented above, despite the ECJ's willingness to grant interim relief, the Court fell short of providing guidance on the conditions under which to utilise the tool. Robert Lane explains the cautious approach of the Court:

The House of Lords expressly called upon the Court of Justice to lay down the criteria to be applied in the grant of interim relief. With no specific guidance from the Treaty, the court would normally, in response to such a question, distil from the practices and procedures of the various member states general principles in order to construct a Community rule. But it did not. Rather it dodged the question by reading into the reference a clear case for interim relief and merely indicating that the House of Lords must set aside the constitutional bar to granting it. The clear disinclination of the court to set out criteria when expressly invited to do so stems from the huge diversity of the relevant law throughout the member states.¹²²

This cautious approach appears to conform to the expectations of the architect's compromise model in that the Court did, as has been shown above with regard to the Court's role as a strategic actor, attempt to further European integration. However, it did demonstrate an understanding of the constraints of the Member States. In particular, "rather than stray[ing] into this minefield" of issuing

¹²¹ Paul Craig and Gráinne de Búrca, *EC Law: Text, Cases, and Materials* (Oxford: Clarendon Press, 1995), 211-212.

¹²² Lane, 311.

specific guidelines dealing with interim relief (which would have proven extremely difficult given the wide variety of forms of interim relief among the Member States), the ECJ simply established the principle but left its implementation to the Member States.¹²³ With respect to the architect's compromise model, we recognise that the Court's decision represented an action which favoured deeper integration, or a_1 .

According to Jowell and Oliver, "*Factortame* aroused something of a stir, but. . . in truth it stated nothing new or surprising in terms of supremacy of Community law."¹²⁴ While *Factortame* might pose a problem for the traditional Diceyan doctrine of Parliamentary sovereignty,¹²⁵ ". . . it is suggested that the British courts can provide that [interim relief] protection without any, or any further, compromise of Parliamentary sovereignty,"¹²⁶ as was explained earlier by the reference to Aragonés.¹²⁷ It is true that the ruling sparked a rather hostile criticism in the House of Commons with Teddy Taylor's request for an immediate debate concerning the sovereignty of Parliament¹²⁸ in addition to frequent cries of fear in the press. However, it was Parliament itself--through the House of Lords--which accepted the move towards further integration by "suspending a statute for the first time and in practical terms, giving full effect

¹²³ Ibid.

¹²⁴ Jowell and Oliver, 51.

¹²⁵ Josef Drexler, "Was Sir Francis Drake a Dutchman?--British Supremacy of Parliament after *Factortame*," *American Journal of Comparative Law* 41, no. 4 (1993): 562-571.

¹²⁶ Nigel P. Gravells, "Disapplying an Act of Parliament Pending a Preliminary Ruling: Constitutional Enormity or Community Law Right?," *Public Law* (1989): 581. See pages 579-585 for a fuller discussion.

¹²⁷ Aragonés, 811-813.

¹²⁸ *House of Commons Official Report*, 20 June 1990, cols. 923-924.

to the supremacy doctrine.”¹²⁹ It is interesting to note that Lord Bridge did respond to the criticism; however, the other “law lords were no doubt happy to leave the relationship between the law-making sovereignty of the United Kingdom Parliament and Community law where it currently stands. That is in a vague, yet relaxed, coexistence, which maintains the primacy of both.”¹³⁰ Specifically, such an arrangement is possible since the ECJ, as evidenced by the *Costa* decision, recognises its supreme authority in the area of European law based on the transfer of sovereignty by the Member States. The Member States, however, tend to base the authority of the Court upon *national constitutional provisions*,¹³¹ which allows *Kompetenz-Kompetenz* to remain with the individual Member States. Nevertheless, discussion in Britain concerning implementing a system of interim relief preceded the *Factortame* case (independent of the case), and influential elements of the legal community had urged the Government to grant courts such a tool.¹³²

With respect to the architect’s compromise model, we can assume the modified preference of the United Kingdom to have been rather apathetic to integration in this instance, or m_2 . While the Thatcher Government often took an antagonistic approach to the Communities, such hostility was more indicative of unbridled preferences as the acceptance of the *Single European Act* suggests

¹²⁹ Maher, 323.

¹³⁰ B. V. Harris, “Parliamentary Sovereignty and Interim Injunctions: *Factortame* and New Zealand,” *New Zealand Universities Law Review* 15, no. 1 (June 1992): 62.

¹³¹ This will be explored more fully in the next chapter on the German reception of European law and the role of the *Bundesverfassungsgericht* in interpreting the *Grundgesetz*.

¹³² See Ami Barav, “Interim relief and English law,” *New Law Journal* 140, no. 6461(22 June 1990): 896.

that with regard to modified preferences, the United Kingdom took a more conciliatory stance. This view is reinforced by the fact that the House of Lords actually did not support the idea of interim relief prior to the ECJ's preliminary ruling but was willing to appeal to Luxembourg for further guidance. Moreover, it was Parliament that decided "in black and white that Community law was to prevail over common law and statute law alike" when the *European Communities Act 1972* was passed as has been earlier demonstrated.¹³³ Finally, Parliament itself--through the House of Lords--accepted the move towards further integration by giving full effect to the doctrine of supremacy. As the House of Lords did grant interim relief to the Spanish fishermen shortly after the ruling,¹³⁴ it is clear that the United Kingdom did accept the Court decision. In examining the architect's compromise model, this is the outcome (o₄) which we would expect. However, the ruling still did not exactly bring the British government under the authority of the Court. Concerning *Factortame*, Lawrence Collins concludes:

It is suggested, therefore, that, at present, whatever may be the position in the future, the correct position in the United Kingdom constitutional law is the orthodox one, that the courts must and will give effect to subsequent United Kingdom legislation, even if it is inconsistent with Community law, subject to the important rule of construction in s 2(4) [*European Communities Act 1972*].¹³⁵

Thus, the relationship between the Court and the United Kingdom remains a series of bargains by which the Court attempts to achieve the aims of the

¹³³ H. W. R. Wade, "What has Happened to the Sovereignty of Parliament?," *Law Quarterly Review* 107 (January 1991): 3.

¹³⁴ Ian S. Dickinson, "European Court Decisions and the British Courts," *Journal of the Law Society of Scotland* 35, no. 12 (December 1990): 516.

¹³⁵ Collins, 39.

Treaties while Britain attempts to conform to its modified preferences regarding European integration. In this manner, Parliament retains ultimate supremacy over the pace and scope of integration in the United Kingdom. However, Parliament is largely restricted in its ability to “fine tune” such integration since modified preferences demand that Britain acquiesce to decisions of the ECJ which often have negative effects on Britain’s unbridled preferences. It is this bargaining process that is captured by the architect’s compromise model.

Britain, the ECJ and Supremacy: A Postscript

While the British government has largely been supportive of the European Court, this does not imply that there are not serious reservations regarding the ECJ and its growing authority. While many political points have been scored by aiming criticisms at the European Court from the debates in the House of Commons, such rash and political statements reveal more about the fears of a desperate Government on the edge of collapse¹³⁶ than responsible criticisms of the Court. However, politics encourages more criticisms of the former type, and thus gauging reasonable criticisms of the Court became much more difficult toward the end of the Conservative Government. However, the *Memorandum by the United Kingdom on the European Court of Justice* for the 1996 Inter-governmental Conference did present such a reasonable critique of the Court and is thus worthy of attention. Identifying itself as “a champion of

¹³⁶ Witness the BSE crisis in the last few months of the Conservative’s Government, 1996-1997.

the Court," the United Kingdom expressed general satisfaction for the Court in the report:

The single market, one of the Community's central achievements, is inconceivable without the power of the Court of Justice to ensure universal application of the common rules of Community law on which it depends. The Court of Justice plays a central part in upholding the legal order established in the Community Treaties. The independence and authority of the Court needs to be confirmed and strengthened, especially in the perspective of further enlargement.¹³⁷

Nevertheless, along with the praise, the United Kingdom also registered concerns about the Court, particularly focusing on three areas.

First, the United Kingdom expressed concern about the possibly of Member States--who, in fact, have made genuine efforts to comply with Community legislation--facing liability for damages.¹³⁸ The United Kingdom expressed concern over financial liabilities:

In the view of the United Kingdom it is in the interests of the citizens of the Union, as tax payers, that governmental liability in respect of a breach of Community law prior to any judgment of the Court of Justice establishing that breach should be limited in ways which strike a fair balance between the protection of individual rights and the protection of the public interest.¹³⁹

Britain was particularly concerned that such rulings as *Francovich*¹⁴⁰ and *Emmott*¹⁴¹ could lead to unreasonable liability for damages.¹⁴²

¹³⁷ United Kingdom. *The 1996 European Union Intergovernmental Conference Memorandum by the United Kingdom on the European Court of Justice* (July 1996), 1.

¹³⁸ *Ibid.*, 2.

¹³⁹ *Ibid.*, 4.

¹⁴⁰ Cases C-6/90 & C9/90, *Andrea Francovich and Another v. The Republic (Italy)*, *Common Market Law Reports* 2 (1993): 66-116; or *European Court Reports* (1991): I-5357-I-5418.

¹⁴¹ Case C-208/90, *Theresa Emmott v. Minister for Social Welfare and the Attorney General*, *European Court Reports* (1991): I-4269-I-4300.

¹⁴² *Memorandum on the European Court of Justice*, 3.

Second, the United Kingdom expressed dissatisfaction over the fact that most decisions of the Court are retrospective even though some decisions result in “disproportionate financial and administrative burdens.”¹⁴³ Although the United Kingdom held that a Member State which failed to comply with a Court judgement was guilty of “a manifest and grave breach of an obligation under the Treaty” and recognised the importance of the Commission’s power to fine such Member States under Article 171,¹⁴⁴ the United Kingdom expressed concern over the lack of limitations regarding such fines. Specifically, the United Kingdom further argued that such fines should not be excessive and limited to three years from the time the case was brought by the claimant.¹⁴⁵

Third, the United Kingdom criticised “the non-applicability of national time-limits in certain cases.”¹⁴⁶ Specifically, the United Kingdom wanted to write into the Treaties “the power which the Court has exercised since its judgement in *Defrenne v. Sabena* in 1976 to limit the retrospective effects of its judgments.”¹⁴⁷ The United Kingdom further identified two manners in which such an amendment would influence European law: “Firstly, it would enable the Court to take account of the consequences for Member States’ finances of giving a judgment retrospective effect. Secondly, in exercise of this power the Court would be able, in exceptional circumstances, to limit the retrospective effect of a judgment even though the relevant issue of law had been settled in a

¹⁴³ Ibid., 2.

¹⁴⁴ Ibid., 5.

¹⁴⁵ Ibid., 5-6.

¹⁴⁶ Ibid., 2.

¹⁴⁷ Ibid., 8.

previous case.”¹⁴⁸ Despite these concerns, the memorandum was largely supportive of the Court in contrast to the frequent political protests as mentioned previously.

Conclusion

Following an initial sketch of the political events that led to Britain's entry into the Communities, this chapter has examined the reception of the doctrine of supremacy by the United Kingdom to further test the model developed in Chapter II. Through the three cases evaluated, the chapter has demonstrated the effectiveness of the architect's compromise model for explaining the expansion of European law in the United Kingdom. Moreover, through a brief analysis of the UK's position toward the 1996 Intergovernmental Conference, it becomes even clearer that the process of integration is a two-stage process: an initial demarcation of the ECJ's jurisdiction followed by the Court's "filling in the gaps." With every Treaty amendment and subsequent actions by the Court, this process constantly repeats itself. This process will be further examined and illustrated in the next chapter with an assessment of Germany and the doctrine of supremacy of European law. For now, however, we can conclude that, in the case of Britain, the architect's compromise model provides a comprehensive explanation of the manner in

¹⁴⁸ Ibid.

which the decisions of the European Court of Justice contribute to the process of European integration.

Chapter VII

Germany and the European Court of Justice

While the German¹ acceptance of the doctrine of supremacy in European Community law has been accomplished--in legal terms, at least--in a manner unlike that of the United Kingdom, this chapter will demonstrate that the architect's compromise still offers a useful model for explaining this phenomenon. This chapter will focus on significant events involving the legal and political culture in Germany vis-à-vis the supremacy of European law and selected notable cases involving the doctrine. This will illustrate the two-step process involved in the expansion of EC law which is implicit in the architect's compromise model. Specifically, the chapter will examine the German legal structure since the Second World War and Germany's commitment to European integration. With regard specifically to German law, the chapter will discuss the *Grundgesetz* (the German Constitution) and the *Bundesverfassungsgericht* (the German Federal Constitutional Court). Two cases by the ECJ, *Internationale Handelsgesellschaft*² and *Wünsche Handelsgesellschaft*³ will then be analysed according to the architect's compromise model. Finally, the chapter will examine the position of EC law and the European Court vis-à-vis Germany

¹ In this chapter, the designation "Germany" refers to the Federal Republic of Germany (FRG), commonly referred to as West Germany prior to reunification in 1989.

² Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *European Court Reports* (1970): 1127-1128.

³ Case 126/81, *Wünsche Handelsgesellschaft v. Germany*, *European Court Reports* (1982): 1479-1501.

following the ratification of the Maastricht Treaty, especially in light of the *Bundesverfassungsgericht's* decision in the *Brunner*⁴ case. This will further test the ability of the architect's compromise model to explain European legal integration. However, before engaging in an analysis of Germany's acceptance of the doctrine of supremacy, it is necessary to provide some background on German legal culture and the history which formed it. Only then is it possible to appreciate the obstacles that the doctrine of supremacy has faced in its incorporation into German law.

The German Legal Environment

Unlike Britain, Germany's legal system is based on a written constitution, the *Grundgesetz*, or "Basic Law." Drafted in the aftermath of World War II, it nevertheless owes much to former German legal culture, although it was also profoundly influenced by the legal precepts of the occupying Allied powers, especially American. Since the framers of the *Grundgesetz* hoped that the reunification of the occupied areas of Germany would occur in due course, the *Grundgesetz* was only intended as a temporary constitution. Nonetheless, given its success in West Germany prior to 1989, and subsequently in the entire Federal Republic, it has become the permanent constitution. An appreciation of the importance of the *Grundgesetz* upon

⁴ Cases 2 BvR 2134/92 & 2159/92, *Manfred Brunner and Others v. The European Union Treaty*, *Common Market Law Report* 1 (1994): 57-108.

Germany is thus fundamental to a full understanding of the German legal climate.

German Legal History

In the political and economic devastation which followed World War II, Germany was “a burnt-out crater of great power politics.”⁵ The Berlin Declaration of 5 June 1945 divided Germany among the victors of World War II, and subsequently, during the Potsdam Conference, Truman, Churchill (later Atlee) and Stalin established a broad plan of administration. This included dealing with Germany as an economic whole. Soon, however, the conflict between the Soviet Union and the Western powers left the area of pre-World War II Germany divided into four sectors, Berlin divided, and the eastern fringes ceded to the Soviet Union and Poland. From the beginning, any notion of co-operation was rife with difficulties, as the French resisted political centralisation and the Russians demanded greater reparations from the western sectors. The seeds of a separate East and West Germany had been sown. In 1947, the British and American sectors were joined economically, and an Economic Council, representing the Parliaments of the participating *Länder*, was established. France and Russia were invited to join; Russia declined while France displayed initial reluctance. However, as a result of unsuccessful negotiations in London and Moscow--combined with the growing Soviet threat, the Marshall Plan and the French fear of being isolated--France agreed to join its

⁵ Günter Kloss, *West Germany: An Introduction*, 2nd ed. (London: Macmillan, 1990), 4.

sector to the British-American administered United Economic Area.⁶ In response to this American, British and French co-operation, the Soviet Union laid the foundation for the German Democratic Republic in the Soviet sector. Thus, with little German participation, two separate states emerged: one, “a liberal, pluralistic democratic state,” and the other, “a communist, worker or peasant state.”⁷ The Allied countries “insisted that any future government of Germany must be federal, democratic, and constitutional.”⁸ Upon the recommendation of the Western military governors and the *Ministerpräsidenten*, a convention was held beginning on 1 September 1948, to formulate a constitution for the Western sectors. After several months, the *Grundgesetz* was ratified by the state parliaments as the Constitution of the Federal Republic of Germany.⁹

Typical of the constitutions of most liberal democracies, the *Grundgesetz* focuses on human rights; provides for a divided system of government; establishes a constitutional court with the power of judicial review; and decrees the *Grundgesetz* as “the supreme law of the land.”¹⁰ Although the *Grundgesetz* is often regarded as being heavily influenced by American ideas, it bears a close resemblance in parts to the Frankfurter Constitution of 1849 and the Weimar Republican Constitution. However, rather than containing “statements of political ideals and guidelines to political action,” as was

⁶ Ibid., 1-3.

⁷ David P. Conradt, *The German Polity*, 4th ed. (New York: Longman, 1989), 15.

⁸ Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed., rev. (Durham, NC: Duke University Press, 1997), 7.

⁹ Conradt, 16.

¹⁰ Kommers, *Constitutional Jurisprudence*, 31.

characteristic of earlier German constitutions, the *Grundgesetz* "is a law of superior force and obligation and is directly enforceable as law" in the court system headed by the *Bundesverfassungsgericht*, or Federal Constitutional Court.¹¹ Through the *Grundgesetz*, "legalism was reintroduced into the German political system."¹² The result was a "reliance on authoritative judicial decisions to resolve political disputes rather than a preference for purely political methods."¹³ The judiciary was thus accorded a significant share of the government's power.

Germany and European Integration

The establishment and growth of channels of European integration were not only prescribed by the *Grundgesetz*, but they were also encouraged by German politicians who regarded such an institutional framework as a means of achieving a greater degree of autonomy and of normalising international relations.¹⁴ Chiefly as a result of Konrad Adenauer's willingness to co-operate with the West and of the increasing tensions between the Soviet Union and the United States, Germany was eventually included in the Western European Union and NATO. Moreover, Germany enthusiastically seized the opportunity for further European integration by becoming a charter member of the ECSC

¹¹ Donald P. Kommers, "The Basic Law of the Federal Republic of Germany: An Assessment After Forty Years," *The Federal Republic of Germany at Forty*, ed. Peter H. Merkl (New York: New York University Press, 1989), 134-135.

¹² Gisbert Brinkmann, "The West German Federal Constitutional Court: Political Control Through Judges," *Public Law* (1981): 85.

¹³ Ibid.

¹⁴ For a more thorough discussion on this matter, see Mary L. Volcansek, *Judicial Politics in Europe: An Impact Analysis* (New York: Peter Lang, 1986), 93-97.

through the Schuman Plan; seven years later, Germany was firmly integrated in Europe as a charter member of both the EEC and Euratom.¹⁵ Importantly, such “strong support for Europe was one way of forgetting about being German after 1945 and of reestablishing relations with Germany’s neighbors. It was also highly advantageous to the German economy.”¹⁶

The German enthusiasm for European integration was motivated, however, not only by political and economic factors. Constitutionally, Germany is bound to work towards European integration. Specifically, in an attempt to prevent another war by anchoring Germany in a pan-European institutional framework, the drafters of the *Grundgesetz* expressed the aspiration for a “united Europe” in the document’s Preamble.¹⁷ Thus, West Germany¹⁸ joined the European Communities based on Article 24¹⁹ of the *Grundgesetz*. However, with the reunification of Germany in 1990, the *Grundgesetz* (which was amended for this purpose) became the constitution for the enlarged Federal Republic.²⁰ At the same time, a new Article 23²¹ was adopted, providing the

¹⁵ Kloss, 8-9.

¹⁶ Conradt, 227. For a further discussion on the German government’s early support for Europe and the *Wirtschaftswunder*, see Gareth Pritchard, “National Identity in a United and Divided Germany,” *European Integration and Disintegration: East and West*, eds. Robert Bideleux and Richard Taylor (London: Routledge, 1996), 157-160.

¹⁷ The first sentence of the Preamble of the *Grundgesetz* expresses this desire: “Im Bewußtsein seiner Verantwortung vor Gott und den Menschen, von dem Willen beseelt, als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen, hat sich das Deutsche Volk kraft seiner verfassungsgebenden Gewalt dieses Grundgesetz gegeben.”

¹⁸ The former East Germany joined the European Communities when it became part of the Federal Republic of Germany by the Unification Treaty of 31 August 1990. For details of legal issues involving the reunification of Germany, see Gilbert H. Gornig and Sven Reckwerth, “The Revision of the German Basic Law. Current Perspectives and Problems in German Constitutional Law,” *Public Law* (1997): 137-158.

¹⁹ *Grundgesetz*, Article 24.

²⁰ For further discussion on the challenges of reunification, see C. W. A. Timmermans, “German Unification and Community Law,” *Common Market Law Review* 27 (1990):

legal basis for Germany's membership in the Communities. Specifically, this new article allows, upon consent of the *Bundestag* and the *Bundesrat*, sovereign powers to be ceded to the European Communities. Moreover, both the Parliament and Federal Council must approve of any modification to the Treaties, along with the approval of the *Länder*,²² which "ensures that a complete parliamentary process is observed" before a further transfer of sovereign power can occur.²³ In this manner, Germany is only able to participate in greater European integration if approved both on a *Länder* and Federal level, which greatly enhances the democratic control of Germany's relations with the Communities.

While the *Grundgesetz* is clear on supporting European integration, the incorporation of EC law has been met with some difficulty, particularly with regard to the doctrine of supremacy--the area of EC law with which we are concerned. At its inception, Community law was grafted onto domestic law

437-449; Christian Tomuschat, "A United Germany Within the European Community," *Common Market Law Review* 27 (1990): 415-436; and Franziska Tschofen and Christian Hausmaninger, "Legal Aspects of East and West Germany's Relationship with the European Economic Community After the Collapse of the Berlin Wall," *Harvard International Law Journal* 31 (1990): 647-659.

²¹ Basically, Article 23 allows and even calls for Germany to participate in the development of a united Europe.

²² Loss of competences by the separate *Länder* has been an important issue in the German approach to European integration. The new Article 23 was partly intended to compensate the *Länder* for lost competences. For a full discussion see Michael Borchmann, "Bundesstaat und europäische Integration," *Archiv des Öffentlichen Rechts* 112 (1987): 586-622; Konrad Hesse, "Bundesstaatsreform und Grenzen der Verfassungsänderung," *Archiv des Öffentlichen Rechts* 98 (1973): 1-52; and Klaus Kröger, *Einführung in die Verfassungsgeschichte der Bundesrepublik Deutschland* (Munich: Beck, 1993): 151-159.

²³ Nigel Foster, *German Legal System and Laws*, 2nd ed. (London: Blackstone Press Limited, 1996), 73.

according to a dualist approach. Nigel Foster explains this phenomenon as follows:

The discussion from the German point of view lies essentially with the relationship of international law, and in particular the membership of the Community, to the provisions of the *Grundgesetz*. Traditionally, Germany adopted a dualist approach to the reception of international law, whereby some form of transformation or adoption of international law was necessary in order for it to have any direct applicability in the state. In practical terms it meant that there had to be a process of incorporation by statute. Once incorporated, a law would simply rank as with other *Gesetze*, and if a later law was in conflict with an earlier law, the latter would prevail.²⁴

Approaching European law from such a dualist legal background, Germany has essentially regarded the body of EC law as international law. Hence, the ultimate legitimacy of Community law in terms of German adherence is based on the *Grundgesetz*, and not upon the Treaties. What this means, and according to the *Bundesverfassungsgericht*, is that German acceptance of European Community law is a result of the provisions of German national law and not from an inherent source of authority flowing from the Communities as assumed by the ECJ. It is this lack of agreement on the origin of supremacy which is at the heart of the debate.

The *Bundesverfassungsgericht* (German Federal Constitutional Court)

Owing to contrasting legal interpretations, the *Bundesverfassungsgericht*²⁵ and the European Court of Justice have been at

²⁴ Ibid., 67.

²⁵ For an account of the *Bundesverfassungsgericht*'s authority vis-à-vis the *Grundgesetz*, see Wolfgang Zeidler, "The Federal Constitutional Court of the Federal Republic of

odds over the precise basis of the doctrine of supremacy. While the ECJ has assumed since *Costa*²⁶ that the doctrine of supremacy is "an inherent feature of Community law," the *Bundesverfassungsgericht* has held that only through German law--Article 34 of the *Grundgesetz*--has European law been granted supremacy in certain fields in the Federal Republic.²⁷ This indicates that in German eyes, primacy remains with German law. Moreover, while Article 24 originally provided the mechanism for Germany's accession to the Communities, it was through Article 25²⁸ that the relationship between German law and EC law was defined. However, this Article provided simply for international law to enjoy primacy over ordinary law; the issue of constitutional law was not addressed.²⁹ Thus, with no established convention on this uncertainty, it has been left to the *Bundesverfassungsgericht* to resolve the issue, and the German constitutional court has consistently upheld the primacy of German law as will be demonstrated below.

Hence, the power of the *Bundesverfassungsgericht* has proven to be a formidable obstacle to the categorical acceptance of EC law. The exact powers of the *Bundesverfassungsgericht* at its inception were unclear since the *Grundgesetz* assigned broad powers to the Federal Constitutional Court yet

Germany: Decisions on the Constitutionality of Legal Norms," *Notre Dame Law Review* 62 (1987): 504-525.

²⁶ Case 6/64, *Flamino Costa v. ENEL*, *European Court Reports* (1964): 585-615.

²⁷ Wulf-Henning Roth, "The Application of Community Law in West Germany: 1980-1990," *Common Market Law Review* 28 (1991): 142.

²⁸ Article 25 reads: "Die allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes."

²⁹ Raymond Youngs, *Sourcebook on German Law* (London: Cavendish Publishing Limited, 1994), 15.

provided that it should be administered under the consultation of the Parliament. However, after considerable pressure from the *Bundesverfassungsgericht*, it was eventually recognised as a completely separate branch of government, and the ultimate guardian of the *Grundgesetz*.³⁰ This necessarily translated into a significant position within the German governmental structure. Klaus H. Goetz adds:

Undoubtedly the Court is politically influential. In fact it is sometimes held that the Court's position is supreme, as it has the authority to control the executive, the legislature and the ordinary judiciary. Accordingly the Court is seen as a superlegislature, ultimately more powerful than the federal parliament, the Bundesrat, the federal government and the federal president combined. According to this view the Court is not just the guardian (*Hüter*) of the constitution, but has evolved into its master (*Herr*), against the intention of the framers of the Basic Law and with problematic consequences for the health and vitality of German democracy.³¹

Without attempting to address Goetz's critique of the domestic politico-legal system in Germany, it is nonetheless clear that the *Bundesverfassungsgericht* occupies an eminent position within the German government. It is exactly this which has provoked significant challenges to the incorporation of European law into the German legal culture. Specifically, the doctrine of supremacy was not accepted by the *Bundesverfassungsgericht* for some time, and even when accepted, the Federal Constitutional Court reserved the right to withdraw its support for the supremacy of EC law should it find the basic rights in the *Grundgesetz* no longer adequately protected under EC law.³² Thus, despite

³⁰ Kommers, *Constitutional Jurisprudence*, 15-16.

³¹ Klaus H. Goetz, "The Federal Constitutional Court," *Developments in German Politics* 2, eds. Gordon Smith, William E. Paterson and Steven Padgett (London: Macmillan, 1996), 96-97.

³² Case 2 BvR 197/83, *Re the Application of Wünsche Handelsgesellschaft*, *Common Market Law Reports* 3 (1987): 225-265.

Germany's apparent enthusiasm regarding European integration, circumstances such as these are indicative of the actual bargaining process which takes place between Germany and the Communities--a bargaining process which will be illustrated by the cases examined in the remainder of this chapter.

The *Solange* Cases and the Doctrine of Supremacy

The two most important German cases dealing with the supremacy of European law are *Internationale Handelsgesellschaft*,³³ commonly known in Germany as *Solange I* ("so long as"), and *Wünsche Handelsgesellschaft*,³⁴ or *Solange II*. More recently, *Brunner*,³⁵ or *Solange III*--a case before the *Bundesverfassungsgericht*--has further clarified the standing of European Community law vis-à-vis the *Grundgesetz*. Briefly, in the first case, the *Bundesverfassungsgericht* ruled that as long as Community law did not provide as stringent protection for human rights as the *Grundgesetz*, German courts were to refer questions of constitutionality to the *Bundesverfassungsgericht*, which could ignore such European Community law. The German Court adopted such a position because EC law is considered derivative law by the

³³ Case 2 BvL 52/71, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *Common Market Law Reports* (1974): 540-592. For the case decided by the ECJ, which preceded this decision by the *Bundesverfassungsgericht*, see Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *European Court Reports* (1970): 1127-1128. In the remainder of this chapter, the two cases will be distinguished by reference to the respective court which issued the ruling.

³⁴ *Re Wünsche Handelsgesellschaft*. For the ECJ case, which preceded this decision by the *Bundesverfassungsgericht*, see Case 126/81, *Wünsche Handelsgesellschaft v. Germany*, *European Court Reports* (1982): 1479-1501.

³⁵ Cases 2 BvR 2134/92 & 2159/92, *Manfred Brunner and Others v. The European Union Treaty*, *Common Market Law Report* 1 (1994): 57-108.

German Constitutional Court and thus must conform to the *Grundgesetz*. The second case represented a change of attitude by the *Bundesverfassungsgericht* since it found that the protection of human rights was sufficiently guaranteed by the European Communities vis-à-vis the *Grundgesetz*. These cases will now be examined more fully in turn, and subsequently analysed through the architect's compromise model.

Internationale Handelsgesellschaft

The case arose out of a grievance against the partial forfeiture of a deposit the import-export company *Internationale Handelsgesellschaft* of Frankfurt am Main had lodged in order to receive a licence for the export of 20,000 metric tonnes of maize meal. In conformity to Council Regulation No. 120/67/EEC,³⁶ the licence was effective from 7 August 1967 until 31 December 1967, and conditional upon lodging a deposit ensuring that the amount of meal would, in fact, be exported. Since only 11,486.764 metric tonnes of the meal had been exported during the period granted for the licence, the Einfuhrund Vorratsstelle für Getreide und Futtermittel held that a portion of the deposit (DM 17,026.47) was to be forfeited under Regulation No. 473/67/EEC.³⁷ The dispute was brought before the *Verwaltungsgericht* (Administrative Court) in Frankfurt am Main, which appealed to the ECJ for a preliminary ruling. Specifically, the *Verwaltungsgericht* initially questioned the legality of the

³⁶ *Official Journal of the European Communities*, special edition (19 June 1967): 33-45.

³⁷ *Journal Officiel des Communautés Européennes*, vol. 10, no. 204 (24 August 1967): 16-20.

deposit and forfeiture guidelines in Council Regulation No. 120/67/EEC, and subsequently, in the event that the said regulation was found to be legal, enquired if Council Regulation No. 473/67/EEC was legal since it excluded forfeiture only with respect to *force majeure*. The referral to the ECJ stemmed from the *Verwaltungsgericht*'s concern that the regulations in question failed to respect the fundamental rights laid down in the Grundgesetz (namely Articles 2 [1] and 14).³⁸

In the proceedings before the ECJ, Internationale Handelsgesellschaft, the Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Germany, the Netherlands and the Commission all submitted arguments. Internationale Handelsgesellschaft criticised the system of deposits and forfeitures, arguing that the Treaty did not authorise the Commission or Council to impose fines (claiming that a forfeiture was, in fact, a fine), and claimed that the deposit and forfeiture system was contrary to the principle of proportionality, ineffective and excessive. Further, Internationale Handelsgesellschaft also argued that to limit disapplying the forfeiture only to cases of *force majeure* was too restrictive. The Einfuhr- und Vorratsstelle für Getreide und Futtermittel argued that the system of deposits and forfeiture did not violate any principles of European Community law, and further, that it was the optimal system for regulating the market. Moreover, the defendant argued that *force majeure* was broad enough to include all reasonable instances of exceptional circumstances which might prevent a grantee from exporting the full amount specified. Despite the

³⁸ ECJ. *Internationale Handelsgesellschaft*, 1127-1128.

Verfassungsgericht's ruling to the contrary (as will be discussed subsequently), Germany, discounting the argument concerning basic rights, maintained that the system of deposits and forfeiture was just and necessary. The Netherlands and the Commission, which stressed that the Community is only bound by its own law, both supported the system of deposits and forfeitures.³⁹

In its decision, the European Court of Justice was clear in arguing the supremacy of European law over that of the Member States. In the decision, the ECJ stated:

Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniform and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.⁴⁰

Hence, as Hartley comments on the case, ". . . even a violation of the fundamental human rights provisions of a Member State's constitution could not impair the validity of a Community provision."⁴¹ In its final analysis, the ECJ further approved the system of deposits and forfeiture.⁴²

³⁹ Ibid., 1128-1133.

⁴⁰ Ibid., 1134.

⁴¹ T. C. Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community*, 2nd ed. (Oxford: Clarendon Press, 1988), 134.

⁴² ECJ. *Internationale Handelsgesellschaft*, 1133-1139.

With regard to the ECJ's preliminary ruling, the *Verwaltungsgericht* was hostile and unsatisfied. In particular, the *Verwaltungsgericht* held that the Community lacked not only a written bill of rights but also a parliament with the authority to establish such a guarantee of basic rights. Moreover, according to Rudden, the German court "found in the ECJ's approval of what it continued to regard as the iniquitous deposit system a powerful confirmation of its deepest suspicions about the 'legal vacuum' of Community law."⁴³ As a result of its discontent, the *Verwaltungsgericht* appealed the case to the *Bundesverfassungsgericht*. Hartley notes that the *Bundesverfassungsgericht* faced two questions: first, whether or not the case was admissible and second, whether or not the system of deposits was justified.⁴⁴

In the first place, the *Bundesverfassungsgericht* examined the relationship between the constitutional law of Germany and EC law to determine whether or not the case was admissible. Beyond recognising that European law is separate from both national and international law, the *Bundesverfassungsgericht* agreed that the respective jurisdictions of the ECJ and the *Bundesverfassungsgericht* constitute separate legal domains: hence, the two courts cannot legally impinge on the jurisdiction of the other.⁴⁵ Accordingly, the *Bundesverfassungsgericht* argued that:

The binding of the Federal Republic of Germany (and of all member-States) by the Treaty is not, according to the meaning and spirit of the Treaties, one-sided, but also binds the Community which they establish to carry out its part in order to resolve the conflict here assumed, that is,

⁴³ Bernard Rudden, *Basic Community Cases* (Oxford: Clarendon Press, 1987), 67.

⁴⁴ Hartley, 224.

⁴⁵ *Bundesverfassungsgericht. Internationale Handelsgesellschaft*, 545-550.

to seek a system which is compatible with an entrenched precept of the constitutional law of the Federal Republic of Germany. Invoking such a conflict is therefore not itself a violation of the Treaty, but sets in motion inside the European organs the Treaty mechanism which resolves the conflict on a political level.⁴⁶

Hence, the *Bundesverfassungsgericht* plainly held that the ECJ cannot expand its own jurisdiction based on the Treaties: any such expansion could occur only through the acts of the Member States to grant additional areas of competence to the ECJ. This conforms to the architect's compromise model's emphasis on the bargaining between the Court and the Member States. Specifically, the expansion of EC law is a two step process, which requires both the clarification of a legal dispute by the ECJ *and the acceptance of this ruling by the Member State or States.*

The *Bundesverfassungsgericht*, in contrast to the reasoning of the ECJ, essentially held that ultimate sovereignty rests in the *Grundgesetz*, and hence with the German nation-state. Further, the *Bundesverfassungsgericht* explained that "Article 24 does not actually give authority to transfer sovereign rights, but opens up the national legal system (within the limitations indicated) in such a way that the Federal Republic of Germany's exclusive claim to rule is taken back in the sphere of validity of the Constitution and room is given, within the State's sphere of rule, to the direct effect and applicability of law from another source."⁴⁷ The German Federal Court was concerned that the basic rights outlined in the *Grundgesetz* were not sufficiently protected by the European

⁴⁶ Ibid., 550.

⁴⁷ Ibid.

legal system given that the European Parliament (at that time) was not directly elected and the Communities lacked a bill of rights, just as the *Verwaltungsgericht* had argued.

The *Bundesverfassungsgericht*, moreover, argued that:

In accordance with the Treaty rules on jurisdiction, the European Court of Justice has jurisdiction to rule on the legal validity of the norms of Community law (including the unwritten norms of Community law which it considers exist) and on their construction. It does not, however, decide incidental questions of national law of the Federal Republic of Germany (or in any other member-State) with binding force for this State. Statements in the reasoning of its judgments that a particular aspect of a Community norm accords or is compatible in its substance with a constitutional rule of national law--here, with a guarantee of fundamental rights in the Constitution--constitute non-binding obiter dicta.⁴⁸

Hence, while recognising that the European Court did enjoy supremacy in its particular area of jurisdiction, the *Bundesverfassungsgericht* clearly conditioned the ECJ's authority upon respect for the *Grundgesetz*. Moreover, the German Federal Court stressed that if the ECJ failed to appreciate the limits to its jurisdiction and issued decisions accordingly, such decisions could not be expected to bind the Member States. This constituted a direct challenge to the authority of the ECJ. The *Bundesverfassungsgericht* further held that "... only the *Bundesverfassungsgericht* is entitled, within the framework of the powers granted to it in the Constitution, to protect the fundamental rights guaranteed in the Constitution. No other court can deprive it of the duty imposed by constitutional law."⁴⁹ Finally, the *Bundesverfassungsgericht* justified its

⁴⁸ Ibid., 551.

⁴⁹ Ibid., 552.

authority to hear the case since “a Community regulation. . . implemented by an administrative authority of the Federal Republic of Germany or dealt with by a court in the Federal Republic of Germany. . . is an exercise of German State power; and in this process, the administrative authority and courts are also bound to the constitutional law of the Federal Republic of Germany.”⁵⁰ Based on these issues, the *Bundesverfassungsgericht* found that “so long as” basic rights guaranteed by the *Grundgesetz* were not sufficiently protected by the European legal system, Community provisions were subject to review by the *Bundesverfassungsgericht*.⁵¹ Thus, Germany essentially balked at the doctrine of supremacy in EC law and instead, asserted the primacy of the *Grundgesetz*, points to which we will return in our later analysis of the architect’s compromise.

In the actual substance of the case, the *Bundesverfassungsgericht* found “the challenged rule of Community law in the interpretation given by the European Court of Justice does not conflict with a guarantee of fundamental rights in the Constitution, neither with Article 12 nor with Article 2 (1) of the Constitution.”⁵² However, the importance of the case lies in its impact on the doctrine of supremacy; therefore, this research mentions the actual substance solely for the purpose of providing a background for understanding the events

⁵⁰ Ibid., 553.

⁵¹ Ibid., 554.

⁵² Ibid., 556.

of the case. In actuality, the ECJ subsequently found that the deposit system for licence export breaches European Law.⁵³

Internationale Handelsgesellschaft and the Architect's Compromise

With regard to *Internationale Handelsgesellschaft*, the architect's compromise model of European integration⁵⁴ appears to explain the events surrounding the case very well. To begin, we can consider the primary actors to be Germany (which includes the *Bundesverfassungsgericht*) and the Court. As has been explained previously, the other institutions, individuals and Member States involved do make an important contribution to the case; however, the model is concerned with the acceptance of European law into the domestic law of a Member State, in this case Germany. Having justified this assumption with a thorough explanation in Chapter III, it is acceptable to eliminate these other players from the analysis. Accepting the Court as a primary actor poses no particular challenge, as this is a fundamental assumption of the model. Given that it is assumed that the national courts (particularly the *Bundesverfassungsgericht* in this case) represent a component of the Member State, namely Germany, accepting Germany as the other primary actor should pose no problems either. Moreover, Karl Doehring also recognises the relevance of following this "construction": "One could argue that the judiciary

⁵³ Rudden, *Basic Community Cases*, 68. See Case 181/84, *The Queen, ex parte E.D. & F. Man (Sugar) Ltd v. Intervention Board for Agricultural Produce (IBAP)*, *European Court Reports* (1985): 2889-2906.

⁵⁴ For a review of the architect's compromise model, please refer to the appendix following Chapter VIII.

also belongs to the state power of the people, since the judges of the Constitutional Court are elected by the parliament.”⁵⁵ Thus, we accept the *Bundesverfassungsgericht* as a component of the actor designated “Germany.”

With regard to the rationality assumption (specifically, that actors pursue purposeful actions), the Court unquestionably conforms to the model although at first glance, Germany appears to pose a few problems. It is true that the Federal Republic of Germany supported the system of deposits and even went so far as to argue that:

The *Government of the Federal Republic of Germany* is of the opinion that in order to reply to the questions put it is unnecessary to examine whether there may be deduced from the EEC Treaty an unwritten reservation in favour of the constitutions of the Member States and, more particularly, of fundamental rights recognised by those constitutions or whether the Community Treaties provide individual rights analogous or equivalent to the fundamental rights generally recognised in the Member States or stipulated by the European Convention on Human Rights.⁵⁶

Such an argument stands in stark contrast to the subsequent reasoning of the *Bundesverfassungsgericht*. However, this discord between the legal arguments of Germany before the ECJ and the attitude adopted by the German courts does not provide a significant obstacle for the architect’s compromise model. First, the very fact that the model regards the Member State as a unit dictates that we cannot consider the German courts and the Government separately. (This is a fundamental assumption first introduced in Chapter II and held steady for the

⁵⁵ Karl Doebling, “Functions and Limits of Judge-Made Law in German Constitutional Law and European Community Law,” *Federalism-in-the-Making: Contemporary Canadian and German Constitutionalism, National and Transnational*, eds. Edward McWhinney, Jerald Zaslove and Werner Wolf (Dordrecht: Kluwer Academic Publishers, 1992), 55.

⁵⁶ ECJ. *Internationale Handelsgesellschaft*, 1131.

entire examination of the model.) Second, we consider the substance of the case: the *Bundesverfassungsgericht* and the government reached the same conclusion that the system of deposits was legally acceptable. Third, as the *Grundgesetz* provides for a division of powers in the government, it is only natural to assume that the actor of the highest level of the judiciary is an acceptable unit of analysis since the architect's compromise model not only includes the decision of the ECJ but also the reaction of the *Bundesverfassungsgericht*.

In the *Internationale Handelsgesellschaft* case, the European Court played the role of a strategic actor. As was evident in the discussion of the case, the ECJ was careful to stress that depriving European law of supremacy could result in the failure of the entire European legal system. Following the advice of the advocate general, the ECJ denied that provisions of the *Grundgesetz* could restrict the judgements of the ECJ to respect particular rights, arguing that "... the validity of a Community decision could not be judged in the light of the Basic German Law."⁵⁷ However, the Court softened its insistence on the primacy of European law at the expense of the Member States by noting:

Does that mean that the fundamental principles of national legal systems have no function in Community law?

No. They contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual.⁵⁸

⁵⁷ Ibid., 1146.

⁵⁸ Ibid.

Yet, despite these conciliatory remarks, the Court refused to acquiesce to the Member States and resolutely rendered a decision in *Internationale Handelsgesellschaft* which was in keeping with prior judgements regarding supremacy of European law that began almost a decade before with *Costa v. ENEL*.

In respect to the assumptions concerning modified preferences, the case illustrates the willingness of a Member State to reject a decision by the ECJ when it fails to conform to modified preferences. Specifically, the Court passed a decision which Germany would not accept *even accounting for the concessions necessary to secure the effectiveness of the Communities*. While one might argue that the German Government's submission approving the system of deposits and forfeitures suggests that the German Government had modified its preferences for retaining ultimate authority, such an argument falls apart when one considers the antagonistic position the *Bundesverfassungsgericht* adopted. Moreover, since the model defines the actor "Germany" as not only the German Government but also the judicial system, it is clear that modified preferences did not prevail. Likewise, modified preferences did not prevail vis-à-vis the Court. As has been argued, the Court took a strict position with regard to the primacy of European law; this was unacceptable to Germany. Clearly, the response of the *Bundesverfassungsgericht* represents rebellion against a decision by the ECJ. According to J. A. Frowein, the decision of the *Bundesverfassungsgericht* in response to *Internationale Handelsgesellschaft* "was clearly not in line with the obligations of the Federal Republic of Germany under European Community

Law.”⁵⁹ Hence, Germany simply ignored the decision, which had significant implications on the prestige of European Community law in Germany. Namely, the case meant that the doctrine of supremacy would not clearly be accepted in Germany for another decade, which in the meantime, undermined the integrity of the ECJ vis-à-vis the *Bundesverfassungsgericht*.

In examining *Internationale Handelsgesellschaft*, the assumptions of the architect’s compromise clearly seem to verify its ability to explain the Court’s impact on integration. The Court’s actions were clearly pro-integration in nature, and thus, we assume the action can be represented as a_1 from the set of actions A .⁶⁰ We can also assume that modified preferences were anti-integration to the extent that the *Bundesverfassungsgericht* did not wish Community law to expand into basic rights issues. Hence, from the set of states of nature, m_3 represents such modified preferences. At this juncture, it might be interesting to speculate on the Court’s decision to proceed with a pro-integration action when we, in retrospect, are aware that Germany’s modified preferences were, in fact, anti-integration in nature. Possibly the most reasonable explanation is that the ECJ did not expect the *Bundesverfassungsgericht* to adopt such a contentious position towards the decision. Moreover, since the German Government did not lodge a concern regarding fundamental rights in the proceedings before the ECJ (rather, the German Government submitted that it was not even an issue of fundamental

⁵⁹ J. A. Frowein, “Solange II (BVerfGE 73, 339). Constitutional complaint Firma W.,” *Common Market Law Review* 25 (1988): 202.

⁶⁰ For a review of the architect’s compromise model, refer to the appendix following chapter XIII.

rights!), the European Court probably held the view that the pro-integration decision would be acceptable to Germany. However, the price the ECJ paid for not appreciating modified preferences meant that there was rebellion against *Internationale Handelsgesellschaft*. Thus, as the architect's compromise predicts, the *Bundesverfassungsgericht*, while accepting the substance of the ruling of the ECJ, rejected the argument that European Community law overrules German national law with regard to basic rights, which conforms to the outcome o_7 from the set O of all outcomes. Hence, the events surrounding *Internationale Handelsgesellschaft* add further credence to the architect's compromise model of European integration. In contrast to this study's other cases in which the rulings of the ECJ were accepted, the decision of the ECJ in *Internationale Handelsgesellschaft* was rejected by Germany. Although the outcome was markedly different, the architect's compromise model also proved capable of explaining *Internationale Handelsgesellschaft*, just as it has concisely and correctly accounted for the process of integration in the other cases heretofore evaluated.

Wünsche Handelsgesellschaft

The response of the *Bundesverfassungsgericht* (case *Re Wünsche Handelsgesellschaft*) to the ECJ's decision in *Wünsche Handelsgesellschaft* represents a reversal of the position the *Bundesverfassungsgericht* adopted with regard to *Internationale Handelsgesellschaft*, which largely alleviated the threat

to the supremacy of European law.⁶¹ The *Bundesverfassungsgericht* changed its position in response to the safeguards for the fundamental rights introduced by the Communities in the time since the *Internationale Handelsgesellschaft* ruling. Content that European law protected basic rights at a level comparable to the *Grundgesetz*, the *Bundesverfassungsgericht* thus stated that it would no longer evaluate the compatibility of EC law to German law. However, the decision was carefully framed as to allow the *Bundesverfassungsgericht* to reserve the authority to withdraw its approval of the doctrine of supremacy if the German Constitutional Court later found that EC law no longer offered as adequate protection of human rights as the *Grundgesetz*, once again making clear that *Kompetenz-Kompetenz* remained with Germany. Such a ruling is illustrative of the bargaining process implicit in the architect's compromise model which will be examined after a review of the facts of the case.

In the national case, the *Bundesverfassungsgericht* was asked to review the ECJ's ruling in *Wünsche Handelsgesellschaft v. Germany*. In *Wünsche Handelsgesellschaft v. Germany*, the ECJ ruled that Council and Commission legislation regarding the importation of preserved mushrooms from non-European Union countries was justified. After initially being denied a license for importing preserved mushrooms and subsequently appealing to the *Verwaltungsgericht* (Frankfurt Administrative Court), the company *Wünsche Handelsgesellschaft* was granted the requested licence based on new legislation before the case was decided by the *Verwaltungsgericht*. The appellant,

⁶¹ "June 1987: Community Primacy and Fundamental Rights," *European Law Review* 12 (1987): 161.

however, did not withdraw from the case, owing to the company's concern that subsequent legislation might also be overly protective. After a dismissal by the *Verwaltungsgericht*, which held that the refusal of the licence was legal, the company appealed to the *Bundesverfassungsgericht*, which subsequently referred to the ECJ for a preliminary ruling on whether the Commission legislation dealing with mushrooms infringed the Council Regulations which regulated the importation of fruits and vegetables. In this case before the ECJ, Wünsche and the Commission submitted arguments. Wünsche maintained that the legislation was unjustified because there was a shortage--not a market disturbance by too many imports--of preserved mushrooms, and the company justified its claims by presenting statistics regarding the importation of preserved mushrooms in the mid-1970s from Taiwan, Korea and China. Moreover, Wünsche argued that France was the only exporter (excluding lower grade mushrooms produced by the Netherlands) at the time and could not provide Wünsche's demand. Finally, Wünsche maintained that the Commission engaged in an unjustified unilateral protectionist policy which favoured French production. In response, the Commission maintained that such policies were necessary to prevent a collapse of Community producers since non-Member State producers provided mushrooms at a cost from 10 to 30% lower than Community producers during the period in question. Additionally, the Commission argued both that no shortage (as Wünsche had claimed) was apparent in June 1976, and that the price had not increased to the extent that Wünsche had suggested. In its ruling, the Court, siding with the views of the Advocate-General, ruled that the disputed Commission legislation was valid.

Accordingly, the ECJ held that the measures taken to regulate the importation of preserved mushrooms were justified and did not cause such shortages or price increases which *Wünsche* had alleged.⁶²

Upon receipt of the preliminary ruling in *Wünsche Handelsgesellschaft* described above, *Wünsche* protested that the ECJ had breached particular German constitutional provisions, particularly that of the right to a hearing since--according to the German company--the ECJ failed to weigh important considerations that *Wünsche* had submitted. Moreover, the German company argued that the case should be suspended and referred to the *Bundesverfassungsgericht* or appealed for a new preliminary ruling from the ECJ. In response, the *Bundesverwaltungsgericht* dismissed the appeal, arguing that the grievances by *Wünsche* were unfounded.⁶³ Maintaining that the *Bundesverwaltungsgericht* violated "procedural and substantial rights"⁶⁴ of the *Grundgesetz*, the German company once again appealed the case with the result that the matter was ultimately brought before the *Bundesverfassungsgericht*.

In its assessment of the case, the German Federal Constitutional Court found that while the appeal was admissible on constitutional grounds, it was not "well founded,"⁶⁵ as the German court reasoned--in contrast to its decision in *Internationale Handelsgesellschaft*--that basic rights were in fact adequately protected by the Communities. The *Bundesverfassungsgericht* then proceeded

⁶² See ECJ. *Wünsche Handelsgesellschaft*, 1479-1501.

⁶³ *Re Wünsche Handelsgesellschaft* (CMLR), 238-245.

⁶⁴ *Ibid.*, 240.

⁶⁵ *Ibid.*, 250.

to defend the actions of the previous courts, arguing that fundamental rights had been respected and ultimately stated that it would no longer accept references concerned with alleged violations of fundamental rights under Article 100(1) of the *Grundgesetz*. Based on the assurance that human rights were adequately protected, the German Federal Constitutional Court maintained that:

In view of those developments it must be held that, so long as the European Communities, and in particular in the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution. . . .⁶⁶

Hence, the *Bundesverfassungsgericht* recognised the ECJ as a “*gesetzlicher Richter* (a legal judge)” in the sense that it has the authority to give definitive rulings.⁶⁷ According to the ECJ such a position greatly enhanced the integrity of the European Court for the time being and contributed significantly to the incorporation of the doctrine of supremacy of EC law into the German legal order. However, as Frowein notes, “It is clear that the Federal Constitutional Court did not give up its jurisdiction or come to the conclusion that no such jurisdiction exists. It only states that it will not exercise the jurisdiction as long as the present conditions as to the protection of fundamental rights by the

⁶⁶ Ibid., 265.

⁶⁷ H. Gerald Crossland, “Member States: Germany: Three Major Decisions Given by the *Bundesverfassungsgericht* (Federal Constitutional Court),” *European Law Review* 19 (1994): 203.

European Court of Justice prevail.”⁶⁸ As the analysis through the architect’s compromise model will demonstrate below, Germany retained the primacy of the *Grundgesetz* in defiance of the reasoning of the ECJ. Hence, the German Federal Constitutional Court did accept the doctrine of supremacy in practice; however, its acceptance was conditional upon the ECJ conforming to the principles of German national law.

Wünsche Handelsgesellschaft and the Architect’s Compromise Model

As with *International Handelsgesellschaft*, the events surrounding *Wünsche Handelsgesellschaft* appear to conform to the assumptions of the architect’s compromise model. Under the initial assumption, we identify two actors: the ECJ and Germany. As it is a central premise of the architect’s compromise, we eliminate the other parties involved in the case in the interest of simplicity, although these certainly exhibit an influence on both the ECJ and Germany. However, having justified this simplification initially in Chapter III and in the first few case studies, the issue of eliminating the other parties from the model warrants no further explanation since it is a feature held constant throughout every application of the architect’s compromise model.

Next, we assume the actors exhibit rational behaviour, as has been defined earlier as being purposeful activity to achieve a particular outcome. The rationality assumption is verified by the Court’s reasoning which supported a

⁶⁸ Frowein, “National Courts,” 203.

growing continuity in European Community law. With regard to the rulings of the European Court, Peter M. Huber notes that the ECJ tends to decide in favour of expanding the competences of the Community, given its “politisches Mandat als Motor der Integration,”⁶⁹ just as the architect’s compromise model assumes. Its decision in *Wünsche Handelsgesellschaft* represented such a purposeful decision to further define the integrity of the Communities. With regard to the rationality of Germany in *Wünsche Handelsgesellschaft*, the Federal Republic did acquiesce to the ECJ; however, it certainly retained the authority to withdraw such support if human rights are no longer found to be adequately protected. Hence, Germany retained *Kompetenz-Kompetenz* while accepting the ECJ’s supremacy in particular areas.

The third and fourth assumptions can be treated together: the Court played the role of a strategic actor, who based its decisions on modified preferences. The case *Wünsche v. Germany* itself did not introduce a new concept; as has been noted previously, the doctrine of supremacy was an established concept of EC law. Rather, the Court’s decision can be interpreted as more of an affirmation of the wide responsibilities enjoyed by the Community institutions, especially the Commission. However, the Court was able to adopt this integration-friendly attitude based on the favourable modified preferences towards further integration which prevailed among the Member States at the time of the decision. Specifically, it is assumed that the Member States were

⁶⁹ Peter M. Huber, “Bundesverfassungsgericht und Europäischer Gerichtshof als Hüter der Gemeinschaftsrechtlichen Kompetenzordnung,” *Archiv des Öffentlichen Rechts* 116 (1991): 213.

receptive to further integration based on two factors: first, the “commonly acclaimed. . . major step towards integration” through the *Single European Act* one year earlier⁷⁰ and second, the expanding protection of human rights by the Community.⁷¹ These events suggest that the Member States’ modified preferences encouraged such further integration.

Finally, Germany, represented by the *Bundesverfassungsgericht*, accepted the ruling of the ECJ as it conformed to German modified preferences. To explain, the issue of fundamental rights did not appear in the case until it was referred back to the German courts following the preliminary ruling in *Wünsche v. Germany*. Aside from the pro-integration climate that prevailed at the time, the case law of the *Bundesverfassungsgericht* in the years prior to the *Wünsche* decision reflected an increasing approval of the developing system of European human rights protection, as is proven by the *Eurocontrol* case.⁷² However, it should be stressed that the decision did *not* recognise an inherent supremacy of EC law, which ultimately allowed the *Bundesverfassungsgericht* to retain a supreme position. Moreover, Frowein notes:

Under German law the legislature cannot intervene in Community matters, because of the acceptance of the priority of Community law. The Federal Constitutional Court wanted to preserve its final authority to intervene where real problems concerning the protection of fundamental rights in Community law could arise. As long as the Community system has not developed into a federal structure, questions of sovereignty or final priority as to sources of law have to be kept in suspense. Only where the rules concerning conflict between European

⁷⁰ Juliane Kokott, “German Constitutional Jurisprudence and European Integration II,” *European Public Law* 2, no. 3 (1996): 426.

⁷¹ “June 1987,” 161-162.

⁷² See Andreas Greifeld, “Requirements of the German Constitution for the Installation of Supranational Authority as posited in the *Eurocontrol* decisions of the Constitutional Court,” *Common Market Law Review* 20 (1983): 87-95.

Constitutional Law and National Constitutional Law lead to the same result can a harmonious development take place.⁷³

Meinhard Hilf maintains that while the *Bundesverfassungsgericht* appreciated the authority of the ECJ, the German Constitutional Court certainly did not give the ECJ a "Blankoscheck" [blank check] since the Member States remain "die Herren der Verträge" [masters of the Treaties]. Furthermore, Hilf maintains that "es sind die Mitgliedstaaten, die das Integrationsprogramm festlegen" [it is the Member States which determine the integration program],⁷⁴ illustrating that the Court is ultimately accountable to the Member States or it risks losing its legitimacy by restriction of its authority in Treaty revisions. Bebr further explains the supreme position Germany maintains by stating:

Thus the Court of Justice will have to see to it that the due process clause be respected even in a preliminary review procedure. Otherwise it could run the risk of the German Constitutional Court abandoning its judicial restraint and reclaiming its power to review Community acts. Specifically, it could mean, as the Constitutional Court observed, that a disregard of a minimum of due process, as embodied in the Basic Law, by the Court of Justice in the preliminary procedure--a contravention which may not even be anticipated--would deprive the preliminary ruling of its binding force.⁷⁵

Therefore, this competence of the European Court is dependent upon the continued protection of human rights by the Communities. Politically, the decision also reserves the right for Germany to later withdraw its adherence to the doctrine of supremacy if the *Bundesverfassungsgericht* is unsatisfied with

⁷³ Ibid.

⁷⁴ Meinhard Hilf, "Der Justizkonflikt um EG-Richtlinien: gelöst," *Europarecht* 23 no. 1 (1988): 9-10.

⁷⁵ Gerhard Bebr, "Case Law: Court of Justice: Case 69/85, *Wünsche Handelsgesellschaft v. Federal Republic of Germany*, Order under Article 177 (EEC) of the Court of Justice of 5 March 1986, not yet reported," *Common Market Law Review* 24 (1987): 729.

the protection of human rights by the Communities, thus maintaining a superior position vis-à-vis the ECJ.

With regard to the expected utility equation underlying the architect's compromise,⁷⁶ we can assume that the action of the Court could be represented by a_2 since the Court did not take any aggressive steps towards integration.⁷⁷ Next, we identify the state of nature, or modified preference as m_1 , or pro-integration. Such an assumption is verified by Germany's absence from the proceedings as well as the more receptive approach to EC law by the *Bundesverfassungsgericht* in cases such as *Eurocontrol* mentioned previously. We can thus expect an outcome of o_2 , or acceptance by the Member State. In fact, Germany, through the decision of the *Bundesverfassungsgericht* in *Re Wünsche Handelsgesellschaft* did accept the decision, as the architect's compromise predicts, and this decision dramatically enhanced the integrity of EC law in Germany.

Brunner

Any analysis of the German acceptance of the doctrine of supremacy of Community law should at least mention the Maastricht Treaty and the *Brunner*

⁷⁶ See the appendix for a review of the expected utility equation upon which the architect's compromise is based.

⁷⁷ It could be argued that a_1 adequately represents that actions of the Court since the function of a decision to favour the Community institutions is a de facto decision for further integration; however, such a conclusion is not obvious, and thus, identifying the Court as apathetic to integration in this particular decision is much easier to justify. However, given the state of nature, or modified preferences that prevailed at the time, the outcome would be the same. Hence, the argument is but academic.

decision since they further clarified the position of the *Bundesverfassungsgericht* regarding EC law. Since the decision is that of the *Bundesverfassungsgericht* and not the ECJ, a thorough discussion is beyond the scope of this research project; however, the findings of the *Bundesverfassungsgericht* in the case do elucidate the position of European law with respect to Germany and the limits of the ECJ's jurisdiction. Such a two-step development in European legal integration conforms to the bargaining process assumed by the architect's compromise model since it requires action by both the ECJ and the Member State to accomplish further integration.

The case, brought by four Members of the European Parliament (in the capacity of private citizens) and a former official of the Commission, challenged the Maastricht Treaty on constitutional grounds. Concerned about "the erosion of national sovereignty and of the powers of the German Parliament," the complainants charged that the legislative assent which ratified the Maastricht Treaty for Germany and the constitutional amendments for this purpose were in violation of the *Grundgesetz*.⁷⁸ The *Bundesverfassungsgericht*, however, ruled that the ratification of Maastricht was compatible with the *Grundgesetz* since the transference of sovereignty was accomplished in accordance with Articles 23 and 24 (*Grundgesetz*).⁷⁹ Hence, while this decision further recognised the doctrine of supremacy of EC law in Germany, it also placed new restrictions on further integration.

⁷⁸ Matthias Herdegen, "Maastricht and the German Constitutional Court: Constitutional Restraints for an 'Ever Closer Union,'" *Common Market Law Review* 31 (1994): 238.

⁷⁹ Nigel G. Foster, "The German Constitution and E.C. Membership," *Public Law* (1994): 404.

The decision formally recognised the compatibility of the new Article 23 of the *Grundgesetz* with the German constitutional order.⁸⁰ Through the article, Germany formalised into its own domestic legal order the concept of European law as a separate legal order which had been long recognised by the European Court,⁸¹ something which undoubtedly enhanced the integrity of the Communities. In particular, while the goal of European unity has been a goal of the *Grundgesetz* as established in the Preamble, Article 23 not only commits Germany to work towards a united Europe but also clarifies the meaning and significance of such a goal.⁸² Specifically, the goal of European integration will entail a greater degree of co-operation between the Communities and the Member States. Much has been made over this new "co-operation" in the academic literature.⁸³ However, although the wording of Article 23 enables the development of a "European Union," the article is hardly explicit on details,⁸⁴ and the exact implications of the new article are obfuscated by the qualifications introduced in the *Brunner* decision. Herdegen summarises the impact of the reasoning in *Brunner*:

This concept of "cooperation" amounts to quite a flat (and renewed) denial of the absolute supremacy of Community law and its supreme

⁸⁰ *Brunner* (CMLR), 82-83.

⁸¹ The European Court of Justice introduced such a distinction between traditional international law and European law as early as 1963, in its *Van Gend en Loos* decision. See Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, *European Court Reports* (1963): 1-30.

⁸² Karl-Peter Sommermann, "Staatsziel „Europäische Union“: Zur normativen Reichweite des Art. 23 Abs. 1 S. 1 GG n. F.," *Die Öffentliche Verwaltung* (1994): 603.

⁸³ See, for example, Foster, "The German Constitution and E.C. Membership," 406-407; Dieter Grimm, "The European Court of Justice and National Courts: The German Constitutional Perspective After the *Maastricht Decision*," *Columbia Journal of European Law* 3 (1997): 235; and Herdegen, "Maastricht and the German Constitutional Court," 239.

⁸⁴ Udo Di Fabio, "Der Neue Art. 23 des Grundgesetzes: Positivierung vollzogenen Verfassungswandels oder Verfassungsneuschöpfung?" *Der Staat* (1993): 195.

judicial organ. . . . This message from Karlsruhe will hardly cause unmitigated enthusiasm in Brussels or Luxembourg. However, the Federal Constitutional Court's position seems conclusive as long as the *pouvoir constituant* of Germany has not yet recognized the absolute supremacy of Community law and as long as the powers of the Constitutional Court are exclusively derived from the Basic Law.⁸⁵

Finally, any future expansion of the competences of the Communities, and hence, the European Court, can only occur within the restrictions placed on such transfers of sovereignty as outlined in Article 23.⁸⁶ Through this article, the *Bundestag* and the *Länder*--through the *Bundesrat*--gained significant powers to consult the Federal Government and affect future German participation in European integration.⁸⁷ Hence, *Brunner* once again proved that the European Communities essentially remain an inter-governmental institution in which the Member States retain ultimate control over the European Court of Justice.

The European Court of Justice, Supremacy and Germany: Concluding Remarks

The purpose of this chapter was to illustrate the ability of the architect's compromise to explain the acceptance of the doctrine of supremacy in Germany. Since 1964,⁸⁸ European law has in principle enjoyed supremacy over national law; however, such a simplification of the disputed competences fails to acknowledge the very real constitutional challenges the doctrine faces with respect to the *Grundgesetz*.⁸⁹ Despite the clarification that first *Wünsche*

⁸⁵ Matthias Herdegen, "Maastricht and the German Constitutional Court," 239.

⁸⁶ Sommermann, 604.

⁸⁷ *Grundgesetz*, Article 23, Sections 2-6.

⁸⁸ Case 6/64, *Flaminio Costa v. ENEL*, *European Court Reports* (1964): 585-615.

⁸⁹ Huber, 216-217.

Handelsgesellschaft and then *Brunner* provided to Germany's position on the supremacy of European law, Hilf's thesis concerning a lack of clear demarcation between German domestic jurisdiction and ECJ authority⁹⁰ remains valid. Specifically, it is unclear as to where the competences of the *Bundesverfassungsgericht* end and those of the European Court of Justice begin.⁹¹ This means that European legal integration will remain a two-step process between Germany and the Court since it requires agreement by both actors to achieve progress. Despite the ambiguity concerning the limits of European and German jurisdictions, one certainty remains: regardless of a decision of the ECJ, the Federal Republic of Germany retains the authority to reject Community law if the European Court goes beyond its granted competence⁹² (as the architect's compromise model predicts). More important still is the very nature of the German constitution itself. It is axiomatic to state that Article 23 grants a greater legitimacy to the Communities since transfers of sovereignty henceforth must have the approval of the *Bundestag*, the *Bundesrat* and the *Länder*,⁹³ however, the *Grundgesetz* remains the "konkretes Grundgefüge"⁹⁴ for the Federal Republic of Germany. As such, one may conclude that the *Bundesverfassungsgericht* retains ultimate supremacy given its role as "guardian of the constitution." While the acceptance of the Maastricht Treaty opened the German legal order to greater integration, the level and speed of such integration vis-à-vis Germany remains a matter for

⁹⁰ Meinhard Hilf, "The Application of Rules of National Administrative Law in the Implementation of Community Law," *Yearbook of European Law* 3 (1983): 79-98.

⁹¹ Huber, 217.

⁹² Matthias Herdegen, *Europarecht* (Munich: Beck, 1997), 163.

⁹³ Sommermann, 601.

several layers of the German government and the judiciary. This is particularly significant for Germany, as a *rechtsstaat*⁹⁵ --“a state based on the rule of law”⁹⁶-- whose identity “is largely founded on and shaped by the constitution. Instead of an identity based on the nation state, discredited by the Nazis, the Federal Republic of Germany developed a ‘constitutional patriotism’ (*Verfassungspatriotismus*), i.e. a pride in the values protected by the constitution and the established political system.”⁹⁷ The significance of such a system on European integration will be further explained below.

According to Dieter Grimm, “Since the *Solange I* ruling, the German Constitutional Court has never deviated from its view that the supremacy of Community law in Germany is conditioned on an adequate protection of fundamental rights on the Community level.”⁹⁸ Through adopting such an approach, the *Bundesverfassungsgericht* has guaranteed that *Kompetenz-Kompetenz* remains with Germany.⁹⁹ Regardless of the ultimate source of authority, however, it is undeniable that “. . . the range of public acts to be controlled by the German Court is gradually narrowing, while the European Court of Justice. . . is assuming greater importance.”¹⁰⁰ This is evident by the idea of greater co-operation outlined in the *Brunner* decision and the manner in which Article 23 allows for further integration¹⁰¹ (albeit with limitations), which

⁹⁴ Huber, 227.

⁹⁵ For a full discussion on the German *Rechtsstaat*, see Brinkmann, particularly pages 84-90.

⁹⁶ Kommers, 34. See also 36-37.

⁹⁷ Kokott, 417.

⁹⁸ Grimm, 231.

⁹⁹ Kokott, 434.

¹⁰⁰ Goetz, 113.

¹⁰¹ Sommermann, 601.

virtually guarantees future expansion of the European Court's jurisdiction. However, the fundamental limitations cannot be overlooked: the *Bundesverfassungsgericht's* "analysis is rooted in the axiomatic understanding that the Treaty on European Union does not set up a supranational entity invested with the insignia of statehood," and the German court further perceives the "union" as a *Staatenverbund*--an association of States--and not an association of people.¹⁰² Hence, the two-step bargaining process implicit in the architect's compromise model will most likely characterise further integration. In addition, the *Brunner* decision effectively ruled out--at least in the short-term--the evolution of the European Union into an entity in the manner in "which the United States of America became a state."¹⁰³ Given this prevailing mood, it is hard to imagine absolute supremacy being accorded to EC law. Accordingly, Herdegen suggests, "The unrestricted primacy of Community law within the domestic legal systems of the Member States would signify nothing less than the birth of federal statehood at the European level."¹⁰⁴ The European Communities in the late 20th Century is ill-prepared for this task. Herdegen further maintains that the Communities' largely inter-governmental--despite elements of supra-nationalism--structure "might deal a mild blow to a school of thought which tends to assimilate the framework of the Community Treaties with a State's 'constitution.'"¹⁰⁵ Clearly, the Communities lack the authority of a State, which ultimately means that the Court must balance its decisions to the

¹⁰² Herdegen, "Maastricht and the German Constitutional Court," 241.

¹⁰³ *Brunner* (CMLR), 90.

¹⁰⁴ Herdegen, "Maastricht and the German Constitutional Court," 240.

¹⁰⁵ *Ibid.*, 236.

political reality of holding a narrow institutional authority, as is suggested by the idea of modified preferences. These matters will be addressed more fully in the following final chapter.

A fundamental problem with regard to the doctrine of supremacy of European law is the discord regarding its source, which also will be examined in greater detail in the next chapter. While the ECJ regards supremacy as an intrinsic quality of European law as initially formulated in *Costa v. ENEL*, the *Bundesverfassungsgericht* has continued to hold that Community law enjoys primacy over national law in Germany solely because the *Grundgesetz* grants such authority;¹⁰⁶ however, “. . . the ECJ cannot give judgments which have the effect of extending the Treaty. If so, they would not be binding in Germany.”¹⁰⁷ Given that the Treaties can only be amended by the unanimous consent of the Member States and the *Bundesverfassungsgericht* occupies the position of “guardian of the constitution” in Germany, the “competence to scrutinize the applicability of Community law, [and]. . . even. . . the actions of the ECJ” hence lies with Germany.¹⁰⁸ Moreover, as long as the Communities have the character of an association of States, “there can never be a transfer of power to create powers (the *Kompetenz-Kompetenz*) and the range of powers transferred can only be within the express and clear parameters as controlled by the Member States as ‘Masters of the Treaty’ (*Herren der Verträge*).”¹⁰⁹ Given these fundamental issues surrounding sovereignty and the position of the European

¹⁰⁶ Roth, 142.

¹⁰⁷ Nigel G. Foster, “The German Constitution and E.C. Membership,” 408.

¹⁰⁸ Grimm, 236.

¹⁰⁹ Foster, “The German Constitution and E.C. Membership,” 407.

Court that have been brought out by the German case studies, it is evident that models for integration must take into account the stress, conflict and interests implicit in decision-making. The foregoing analysis, along with the case studies on *Internationale Handelsgesellschaft* and *Wünsche Handelsgesellschaft* confirm the rigour of the architect's compromise model of European integration with its emphasis on a two-step process of bargaining between the ECJ and the Member States. Hence, we conclude this chapter satisfied that the architect's compromise has once again provided a suitable model for analysing the role of the ECJ in European integration and the reception of EC law by the Member States. The next, and final, chapter will summarise the findings of this research project and discuss their implications.

Chapter VIII

Conclusion

The goal of this research project has been to formulate a rigorous model for explaining the role of the European Court of Justice in the process of European integration vis-à-vis the Member States. As political scientists and legal scholars hold markedly contrasting assumptions regarding the role and power of the European Court (political scientists, for example, preferring to focus on examining the Court as a purely political actor; whilst legal scholars tend to discount external forces influencing the Court), a particular goal of this project was to examine a portion of the legal scholarship on the ECJ and to explain it through political science methodology. Such an approach is an attempt to illustrate the real political power held by the Court despite its role as a legal institution. Moreover, despite the acknowledgement that the Court has exerted a formidable influence on integration, there has been a paucity of research in political science on the manner in which such influence has been achieved. In response, it has been a goal of this research project to provide an initial explanation rooted in political science for the role of the ECJ in the process of European integration in lieu of a model built upon pure legal methodology. Conceding the dramatically different assumptions of legal analysis compared to the foregoing research's analysis, it can nonetheless be

concluded that this research project provides a fresh approach to explaining legal integration in political science terms.

The current research stemmed from the debate between two competing models of European legal integration: neofunctionalism and neorationalism. As was established at the beginning of this project, Mattli and Slaughter's neofunctionalist model and Garrett and Weingast's neorationalist approach fail to take some serious considerations into account. Moreover, these models have not been systematically and thoroughly tested.¹ In contrast, the architect's compromise model developed here has been critically examined through a series of cases. Granted, the examination was restricted to the area of supremacy of European law, and it would be premature to assume that the architect's compromise would completely explain the role of the ECJ in European integration. However, throughout the course of this analysis, it has been demonstrated that the approach has proven rigorous under examination and thus, provides a suitable foundation for further study of the European Court. Moreover, the model has served to highlight challenges facing the development of European law. Hence, this research project has not only identified a new and more effective means in which to analyse legal integration, but also has exposed a number of issues which are fundamental to the development of a European legal jurisprudence. This conclusion will focus on three major themes which the foregoing research has identified. First, we will recognise the suitability of the

¹ Indeed, the only case to which these models have been applied is *Cassis de Dijon*. See Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, *European Court Reports* 1 (1979): 649-675, or *Common Market Law Reports* 3 (1979): 494-515.

architect's compromise model for examining European legal integration. Second, we will consider the nature of European constitutionalism and its impact on the European integration project. Finally, we will address further research avenues related to this research project. Before discussing these related issues, however, a review of the architect's compromise is warranted.

The Architect's Compromise Model

To begin, the analysis conducted by this research confirms the integrity of the architect's compromise model as a means of examining European legal integration. Following the literature review in Chapter I, Chapter II initially provided a critique of the neofunctionalist model and Garrett's neorationalist approach. This served to lay the foundation for the architect's compromise model in providing an analysis of the deficiencies in existing explanations of the integration process. The architect's compromise model was then outlined and tested against the Court's decisions in *Cassis de Dijon* (selected since it was the only case examined by Mattli and Slaughter and Garrett) and *Francovich v. Italy*² (examined because it provided a more recent pivotal decision), both of which confirmed the ability of the architect's compromise model to accurately explain the manner in which legal integration occurs.

² Cases C-6/90 & C9/90, *Andrea Francovich and Another v. The Republic (Italy)*, *Common Market Law Reports* 2 (1993): 66-116; or *European Court Reports* (1991): I-5357-I-5418.

Chapters III and IV were then devoted to examining the assumptions of the model. Chapter III justified the selection of the Court and the Member State (in which all organs of the government are included as a single unit) or States as the primary actors. Additionally, this chapter examined the issue of constitutionalism and the Communities and concluded that the Treaties cannot fulfil the role of a constitution in the traditional sense. While this issue will be addressed subsequently, for the moment, it is sufficient to note that the lack of a true constitution limits the growth of the European Communities despite the tendency of scholarship to simply overlook this theoretical obstacle.³ Chapter IV justified the remaining assumptions of the architect's compromise model. After initially demonstrating that the primary actors conformed to the assumption of rationality made here--specifically, their actions are purposeful in nature--the chapter confirmed the manner in which the Court acts as a strategic actor, who finds its motivation in enhancing the integrity of the European legal system. The remainder of Chapter IV examined the idea of modified preferences and the influence this concept exerts not only on the Court's decisions but also on the subsequent acceptance or rejection of ECJ decisions. Hence, Chapters II, III and IV demonstrated the inadequacies of existing models and, in response, presented the architect's compromise as an alternative with its assumptions on bargaining between the Court and the Member States. The remainder of the research project examined these proposals and tested them against the actual events of European legal integration.

³ Dieter Grimm, "Does Europe Need a Constitution?," *European Law Journal* 1, no. 3 (November 1995): 291.

In particular, since the research project identified the doctrine of supremacy and its development as the particular area of EC law to be tested by the architect's compromise model, the remaining three chapters concentrated on this matter. The doctrine of supremacy was selected as the subject for two primary reasons: first, it represents a fundamental aspect of European Community law; and second, the concept was formulated by the ECJ and is absent from the Treaties, thus demonstrating the aggressive role the Court has adopted to filling in the gaps of the Treaties. Chapter V provided an examination of the doctrine of supremacy after an initial commentary on the related concept of direct effect, followed by an examination of the case which established this principle (*Van Gend en Loos*⁴). The second half of the chapter then examined the doctrine of supremacy in depth. This section examined supremacy vis-à-vis the Treaties, the Member States, the concept of sovereignty and international law. An overview of the incorporation of the concept into French law was illustrative of the importance of the Member States in the acceptance of the doctrine. Finally, the chapter concluded with an examination of *Costa v. ENEL*⁵--the case which first established the concept of supremacy. Chapter VI examined the incorporation of the doctrine of supremacy into the domestic law of the United Kingdom. The United Kingdom was selected for four main reasons: first, the UK is generally viewed as being Eurosceptic; second, as one of the larger Member States, the United Kingdom exhibits a particularly influential role in European integration; third, Britain's unwritten

⁴ Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, *European Court Reports* (1963): 1-30.

⁵ Case 6/64, *Flamino Costa v. ENEL*, *European Court Reports* (1964): 585-615.

constitution and common law tradition contrasts significantly with the civil law traditions of continental Europe; and fourth, the UK joined the Communities relatively late. This means that, because the UK entered the Communities after its founding, the debates and legislation concerning Britain's accession could be examined in order to illustrate the manner in which such events conformed to the logic of the architect's compromise model. *Macarthys Ltd. v. Smith*,⁶ *Marshall v. Southampton*⁷ and the *Factortame* cases⁸ were then examined to illustrate the gradual incorporation of the doctrine of supremacy into the British legal system. Each of these cases reinforced this research project's claim that the architect's compromise offers an appropriate method for analysing the process of British acceptance of European law. Likewise, Chapter VII illustrated the suitability of employing the architect's compromise for examining the acceptance of European law in Germany. Germany was chosen as a subject of this research project based on three reasons. First, often identified as a champion of the integration process, Germany plays a particularly important role in European integration based on its size, economy and history; second, Germany was a founding member of the Communities; and third, Germany's *Grundgesetz* and governmental structure have played a significant role in the Federal Republic's participation in the Communities. These factors underline

⁶ Case 129/79, *Macarthys Ltd. v. Wendy Smith*, *European Court Reports* (1980): 1275-1297.

⁷ Case 152/84, *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, *European Court Reports* (1986): 723-751; or *Common Market Law Reports* 1 (1986): 688-713.

⁸ Case 213/89, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. And Others*, *European Court Reports* (1990): I-2433-I-2475; and Case 221/89, *Regina v. Secretary of State for Transport ex parte Factortame Limited and Others (No. 2)*, *Common Market Law Reports* 3 (1990): 589-632.

both the importance of German acceptance of the doctrine to the Court's legitimacy and the complex route to acceptance by the Member States which Court decisions may face. The chapter began with an examination of the German legal system following World War II, which highlighted the importance of the *Grundgesetz* and the *Bundesverfassungsgericht* in Germany, and hence, their respective impact on the acceptance of the doctrine of supremacy. Much of the remainder of the chapter was devoted to testing the architect's compromise model in the ECJ's judgement in *Internationale Handelsgesellschaft*⁹ and in *Wünsche Handelsgesellschaft*¹⁰ along with the response of the *Bundesverfassungsgericht* to these cases. Together with *Brunner*,¹¹ the analysis of these cases further verified the strength of the architect's compromise in explaining the manner in which European legal integration occurs. Based on these results, this research project concludes that the architect's compromise offers an appropriate means to explain European integration vis-à-vis the European Court of Justice. The following section will offer a final review of the logic of the assumptions of the model to draw final conclusions with regard to the assumptions of the model.

⁹ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *European Court Reports* (1970): 1127-1128; and Case 2 BvL 52/71, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, *Common Market Law Reports* (1974): 540-592.

¹⁰ Case 126/81, *Wünsche Handelsgesellschaft v. Germany*, *European Court Reports* (1982): 1479-1501; and Case 2 BvR 197/83, *Re the Application of Wünsche Handelsgesellschaft*, *Common Market Law Reports* 3 (1987): 225-265.

¹¹ Cases 2 BvR 2134/92 & 2159/92, *Manfred Brunner and Others v. The European Union Treaty*, *Common Market Law Report* 1 (1994): 57-108.

The Architect's Compromise Model: A Review

To begin, the actors are recognised as the ECJ and the Member State (or States). By limiting the actors, the model focuses on the actors which actually make the specific decisions that determine the scope and depth of integration. In contrast to neofunctionalism, the architect's compromise model discounts the sub- and supra-state actors from the analysis; such exclusion is not a failure to recognise the influence of these actors since they undoubtedly represent important forces on the integration process. However, the architect's compromise model is concerned with the actual decisions which lead to integration, stagnation or disintegration. Therefore, these sub- and supra-state actors are eliminated in an attempt to focus solely on the actors which have the authority to make decisions which determine the pace and scope of integration. It is the opinion of this research that the architect's compromise model offers such an explanation of the primary decision-making procedure and would welcome research into these secondary forces.¹²

Second, these actors are assumed to be rational. As has been explained throughout this research, this use of rationality assumes that behaviour is purposeful to the extent that actors make decisions to maximise their respective goals despite incomplete information. With each case study, the assumption has

¹² For an examination of the domestic forces influencing European integration, see Bulmer, Simon, "Domestic Politics and European Community Policy Making," *Journal of Common Market Studies* 21, no. 4 (June 1983): 349-363; for a discussion on the need for research into the decision-making process within the Court itself, see T. Koopmans, "Judicial Decision-making," *Legal Reasoning and Judicial Interpretation of European Law: Essays in Honour of Lord Mackenzie-Stuart* (Gosport, Hampshire: Trenton Publishing, 1996): 93-104.

been justified by demonstrating the manner in which each actor exhibited purposeful behaviour as to best achieve the actor's goals. Specifically, predisposed through its "genetic code" to rule in a manner to enhance Community law,¹³ the Court has a mandate to achieve the aims of the Treaties, and the case studies and analysis of this research project illustrate the Court's purposeful approach in accomplishing those aims. Likewise, the Member States have also freely and wilfully committed themselves to the European project for the purpose of participating in the economic, political and security benefits it provides, despite the costs (most notably a loss of sovereignty).

The third assumption is that the Court plays the role of a strategic actor whose goal is maintaining and furthering the effectiveness of the European Communities. Alter explains the Court's role as a strategic actor:

The interests of the ECJ were to be an authoritative voice on issues of EC law, which meant having cases and interesting legal questions to rule on and creating a means to elicit compliance with its decisions. The Court used the resources it had to help realise these interests, and in the case of the EC legal system the resources it had were above and beyond that of a traditional court.¹⁴

As this research has shown, it is widely acknowledged that the Court employs a teleological approach in its decisions. In so doing, the ECJ operates on the "underlying assumption that they [the objectives of the Treaties] will lead eventually to an economic and political union."¹⁵ Moreover, the importance of

¹³ G. Federico Mancini and David T. Keeling, "Democracy and the European Court of Justice," *Modern Law Review* 57, no. 2 (March 1994): 186.

¹⁴ Karen J. Alter, "The European Court's Political Power," *West European Politics* 19, no. 3 (June 1996): 480.

¹⁵ L. Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities*, 4th ed. (London: Sweet and Maxwell, 1994), 317.

the teleological approach to decision-making in the Court confirms the assumption of the architect's compromise that the Court is a strategic actor. Reflecting the same conclusions of the case studies in this research, Kari Joutsamo adds "by its argumentation the Court of Justice tries to strengthen the supremacy of Community law over national law."¹⁶ Based on the evidence throughout this research project, we assume the Court plays the role of a strategic actor, motivated by enhancing the integrity of European Community law.

Fourth, the architect's compromise model assumes that the Court's decisions usually conform to modified preferences as to ensure further integration. To review, the term *modified preferences* characterises the attitudes of the Member States towards the benefits of European integration devoid of unbridled preferences for short-term gains from free-riding or other forms of evading Community obligations. Given the Court's status as a strategic actor, not only does it seek to enhance the standing of European Community law through its teleological approach, but the ECJ also restrains its judgements within the boundaries of the modified preferences of the Member States. If it fails to do this, the ECJ risks rebellion by the Member States against its decisions. Such an understanding of the Court's political role within the constraints set by the Member States in the Treaties is readily acknowledged by a number of ECJ Members. For example, referring to the operations of the European Court of Justice, Judge Everling has explained "... the work we are

¹⁶ Kari Joutsamo, "Some Aspects of the Impact of the Court of Justice on Integration in the European Communities," *Nordisk Tidsskrift for International Ret* (1980): 81.

doing is political.”¹⁷ Likewise, Judge Mancini has noted that “the painful lesson for the Court is that nothing that it does cannot be undone and that no aspect of the *acquis communautaire* is safe from abrogation if it proves unpalatable to the Court’s political masters.”¹⁸ Such clear expressions of the political constraints that underlie decisions by judges of the Court illustrate the political nature of ECJ decisions. Recognising these limitations, this research has argued that the Court prudently adopts decisions which conform to the Member States’ modified preferences.

The fifth and final assumption maintains that Member States will accept Court decisions which conform to their modified preferences. In most of the case studies, the decisions of the ECJ were accepted, which thus suggests that the Court’s decisions usually conform to modified preferences. The most obvious exception to this trend is the decision in *Internationale Handelsgesellschaft*, in which the reasoning of the ECJ was rejected by the *Bundesverfassungsgericht*. As was explained in Chapter VII, such rejection can be attributed to the ECJ’s unwillingness to conform with modified preferences. As a result, the German Constitutional Court, in declaring that *Kompetenz-Kompetenz* was retained by the Federal Republic, did not accept the doctrine of supremacy. The openly defiant reaction of Member States in cases such as *Internationale Handelsgesellschaft* illustrates that the Member States are prepared to directly challenge the authority of the ECJ when EC law breaches

¹⁷ Alan Dashwood et al. *The Developing Role of the European Court of Justice* (London: European Policy Forum and Frankfurter Institut, 1995), 79.

¹⁸ Giuseppe Federico Mancini, “Crosscurrents and the Tide at the European Court of Justice,” *Irish Journal of European Law* 2 (1995): 132.

fundamental national constitutional principles and hence modified preferences, which further conforms to the logic of the architect's compromise model.

Constitutionalism

Perhaps the greatest legal issue facing the Communities is the ambiguity surrounding its constitutional foundation. It is not the intention of this conclusion to repeat the arguments developed in Chapter III.¹⁹ Hence, given the prior thorough discussion on constitutionalism, it is sufficient to allow Frank Vibert's comments summarise the problem:

. . . viewed as a constitution the Treaty is gravely defective. There is no enumeration of the rights and prerogatives of member-states, or attempt in even general terms to incorporate such principles as 'subsidiary' which might aim to demarcate responsibilities. There is no attempt to provide for checks and balances between executive, legislative and judicial functions of the type which would be regarded as essential for the constitution of a modern state. . . . They lay the basis for activist interpretations of the Treaty provisions rather than judicial limits.

The democratic rights and civil liberties of individuals are mentioned only in passing. The Treaty is showing its age: its framers were more concerned with providing a supranational platform for benevolent bureaucrats than a framework and processes for the exercise of political choice by the citizens of member-states.²⁰

Given Vibert's concerns and those outlined throughout this research project, especially that the Treaties lack of a primary source of legitimacy, we have concluded that the Treaties do not form a constitution for the European

¹⁹ See particularly Theodor Schilling, "The Autonomy of the Community Legal Order: An Analysis of Possible Foundations," *Harvard International Law Journal* 37, no. 2 (Spring 1996): 389-409; and J. H. H. Weiler and Ulrich R. Haltern, "The Autonomy of the Community Legal Order--Through the Looking Glass," *Harvard International Law Journal* 37, no. 2 (Spring 1996): 411-448.

²⁰ Frank Vibert, "Europe's Constitutional Deficit," James M. Buchanan et al. *Europe's Constitutional Future* (London: Institute of Economic Affairs, 1990): 87-88.

Communities. The issue of constitutionalism has emerged as a significant issue in this research project and warrants a discussion in this conclusion given the ramifications for the ECJ's authority and for the compliance of EC law by the Member States.

While the lack of a constitution in itself certainly does not prevent the Court from playing a fundamental role in European economic and even political matters, it nonetheless permanently restricts the competences of the Communities. Despite the tendency of academics to refer to the "constitutionalisation" of the Treaties, these documents remain less than a true constitution given that the Community's authority flows from an external source. As such, the institutions are limited in the actions that they can pursue. There is, however, no need for alarm: the Member States are at liberty to delegate greater authority *if they so choose*. What is fundamentally important to recognise, however, is that to assume that the Treaties form a constitution is to disregard the political realities that frame the activities of the European Communities. Such oversimplification of political and legal realities contributes to the already complex and undemocratic reputation which the Communities have gained.²¹ Given the significant impact these issues have upon the legitimacy of the Court, it is in the interest of European integration to address these issues prudently and objectively.

²¹ See, among many other works on this subject, Brigitte Boyce, "The Democratic Deficit of the European Community," *Parliamentary Affairs* 46, no. 4 (October 1993): 458-477.

The issue of constitutionalism is necessarily wed to the ultimate political destination of the Communities. It is clearly beyond the scope of this research to speculate on the ultimate destiny of the Communities since that is a political decision collectively determined by the separate Member States; however, it must be stressed that without the necessary legal structure, the Communities are restricted in the manner in which they might evolve. As a constitution ensuring *Kompetenz-Kompetenz* is virtually a pre-condition for a federal state, the European Union would face a myriad of complications should it attempt to function as a federal state without such a constitution. However, as will be discussed subsequently, the evolution of the Communities into a federal state--despite any level of political and legal posturing--might not be desirable and may even be impossible. Nevertheless, we overlook for a moment these obstacles in order to initially note a few of the conditions necessary for the creation of such a federal state.

If European integration means the ultimate establishment of a European state, a constitution, vesting *Kompetenz-Kompetenz* with the Communities is essential. Vibert points out the real problems of adhering to the existing Treaties for building such a state:

The assumption that political integration in Europe can continue to be pursued through indirect methods is a false one. It insults the instincts and intelligence of the peoples of Europe. It provokes a myriad of ill-defined and contradictory fears. It stimulates irrational opposition. It aggravates the tensions between the ties of the old political order that are under challenge and the ties of the new order of political association which have yet to be firmly established.²²

²² Frank Vibert, *Europe: A Constitution for the Millennium* (Aldershot: Dartmouth, 1995), 222.

Despite any amount of “constitutionalising,” the Treaties remain a creature unlike any traditional national constitution. Although conceived from international law, as Schilling so convincingly proves,²³ the Communities undoubtedly consist of an unprecedented institutional network which blurs the apparent authority of the Member States, having progressed beyond the realm of a traditional international organisation. Nevertheless, the mechanisms to ensure compliance rely more upon the continued willingness of the Member States to honour the commitments they have undertaken than upon the powers of the Communities. To vest the Communities with power significant to guarantee compliance would require a decisive transfer of sovereignty from the Member States. To be certain, this is no minor detail as such a transfer of sovereignty required to achieve this situation would reverse the power structure of the Communities from the national capitals to Brussels, Luxembourg and Strasbourg. Moreover, this would require substantiation by the citizens. At the moment, the Communities derive their power from the separate Member States who receive their respective authority from constitutions (written or unwritten as the case may be) which base their legitimacy upon their respective citizens. In this manner, the respective national governments receive their legitimacy from popular support of the citizens. Dieter Grimm explains this matter:

... it is inherent in a constitution in the full sense of the term that it goes back to an act taken by or at least attributed to the people. . . . There is no such source for primary Community law. It goes back not to a European people but to the individual Member States, and remains dependent upon them even after its entry into force. While nations give themselves a constitution, the European Union is given a constitution by third parties. It consequently does not have the disposal of its own

²³ Schilling, 389-409.

constitution. The 'Master of the Treaties'. . . are still the Member States, who have not been, as it were, absorbed into the Union.²⁴

At present, the popular support and political will to transform the Communities into a constitutional entity simply does not exist as will be further illustrated below.

Werner von Simson suggests that since identification remains with the nation-state and not at the European level, a complete European administration simply does not work.²⁵ Moreover, Dieter Grimm further argues:

The legal foundation that fits an association of States is the Treaty. It has all the features that allow legal binding of Community power, yet leaves the basic decisions about the Community with the Member States, where they can be democratically checked and accounted for. A European Constitution would not be able to bridge the existing gap and would consequently disappoint the expectations associated with it. The legitimation it would mediate would be a fictitious one. Accordingly, when it comes down to it constitutions are still something to do with States, and anyone calling for one for Europe should be aware what movement he is thereby setting going.²⁶

Thus, the notion that the Treaties are called upon to exercise this constitutional role is rife with theoretical problems, not the least of which is the derivative nature of the Court's authority. Without significant safeguards for its authority, the ECJ's continued legitimacy remains contingent upon respect from the Member States. Failure to recognise the limits of the Treaties provides no solution; rather, it further complicates an already complicated legal structure by prolonging, delaying and concealing--but not alleviating--conflicts between

²⁴ Grimm, "Does Europe Need a Constitution?" 290-291.

²⁵ Werner von Simson, "Was heißt in einer europäischen Verfassung „Das Volk“?" *Europarecht* 26, no. 1 (1991): 10.

²⁶ Grimm, "Does Europe Need a Constitution?" 299.

national and Community law. Noting these fundamental theoretical problems, it is the opinion of this research that these issues should be evaluated frankly and thoroughly, especially given that--in the words of Grimm--many experts simply "gloss over this."²⁷ Ultimately, the legitimacy of the ECJ and even the long-term viability of the Communities is connected to these constitutional issues.

Future Research

Finally, the foregoing analysis suggests a number of avenues for future research, two of which deserve particular mention. First, as this study has been concerned with the doctrine of supremacy, further research concerning the architect's compromise model should be conducted to measure its ability to explain other areas of European law, as will be elaborated on below. Second, the foregoing research has served to highlight the importance of further study of the ECJ's constitutionalism without a formal constitution, and the present author suggests that further research in this area, combined with an alternative set of assumptions regarding this "neoconstitutionalism" is warranted, as will additionally be addressed in turn.

To explain, the model should be subjected to further rigorous testing to confirm the results of this research for other areas of European law. The current research has been focused on one particular theme in European Community law: the doctrine of supremacy. It is almost axiomatic to note that

²⁷ Ibid., 291.

before the architect's compromise model can be fully accepted, it must be tested according to other areas of European law to determine its ability to explain these as well as it has explained the doctrine of supremacy. The present author would suggest the concept of direct effect as a logical candidate for further testing of the model.

Second, recognising an entirely new field of law would weaken the temptation to make assumptions on Community law based either on traditional international law or on national law, as the case might be. The legal authority of the Court rests upon a narrow foundation, and assumptions of European Community law should recognise this situation. A model like the architect's compromise, with its emphasis on the bargaining between the Member States and the Court, is warranted to adequately capture the constraints of this unique and unprecedented legal system. Because the sovereign powers held by the Communities fall short of a state but are more significant than an international organisation, Grimm expresses that "as a matter of political taxonomy, the European Community is still a novelty in want of a convincing label."²⁸ Notwithstanding the recognition of a "new legal order,"²⁹ scholarship in the field has relied largely on either comparing the Communities to the development of American federalism, assuming notions of national law or employing international law as a starting point for analysis of European law. The problem with these approaches is that Community law is fundamentally different these

²⁸ Dieter Grimm, "The European Court of Justice and National Courts: The German Constitutional Perspective After the *Maastricht* Decision," *Columbia Journal of European Law* 3 (1997): 229.

²⁹ *Van Gend en Loos* (ECR), 12.

other legal orders. Despite the temptation to compare the Communities to the United States, such comparisons fail to recognise, among other things, the fundamental point that *Kompetenz-Kompetenz* lies with a centralised, federal government in the United States while it resides in fifteen national capitals in the Communities. Nicholas Emiliou explains, "The Communities have only the powers assigned to them by the Treaties, while all residual powers are left with the Member States. In other words, all the Communities possess is merely derived power. . . ."³⁰ This derived power ensures that the Communities will not have *Kompetenz-Kompetenz* unless the Member States transfer this competence to the Court. No amount of legal manoeuvring can transfer the ultimate power structure from the national capitals to the Communities without the consent of the Member States. Furthermore, neither can assumptions of traditional international law be used to analyse the Communities since the competences of the Communities fall short of a state but extend further than a traditional international organisation. Hence, the case for an alternative means to examine the European Court is warranted.

In fact, in *Van Gend en Loos*, the ECJ did recognise a "new legal order of international law." Nevertheless, while scholarship in the discipline is quick to point out this distinct field of law, it has failed to develop a theoretical foundation for analysing it. This has resulted in the formation of theoretical models which either accord too much power to the European Court or fail to appreciate the real impact EC law exerts. These problems are precisely

³⁰ Nicholas Emiliou, "Opening Pandora's Box: The Legal Basis of Community Measures Before the Court of Justice," *European Law Review* 19 (1994): 488.

mirrored in the neofunctionalist model and Garrett's neorationalist approach which provided this research project with its impetus. To alleviate these problems, the architect's compromise with its reliance on modified preferences was derived. It is the hope of this research project that the architect's compromise makes such a contribution to the foundation of a new legal approach.

Through the manner in which the architect's compromise model captures the bargaining process between the Member States and the Court, the model illustrates the mutually dependent relationship that characterises this "new legal order." Specifically, sovereignty no longer resides exclusively with the Member States; rather, significant competences have been transferred to the Communities. Granted, the Member States still retain *Kompetenz-Kompetenz*, they have the authority to modify the Communities and, ultimately, the Member States retain the power to dissolve the Communities. However, given the economic and political benefits of membership, the Member States are unlikely to rebel except in the most extreme circumstances. This is precisely the situation which is so aptly captured in the idea of modified preferences.

Moreover, the architect's compromise model could serve as a methodological tool to analyse other emerging regional organisations. With the emergence of regional co-operative blocs around the globe, the need for a model to explain the expanding legal structure of such organisations is evident. Granted, no other regional grouping matches the European Communities in its level of centralisation and maturity; however, many of these other regional

groups rely on a realm of law which is also removed from traditional international law. Hence, the ultimate contribution of this research project could be to argue that increasing international interdependence and especially the growth of supra-national and inter-governmental organisations necessitates the recognition of a new realm of law.

Final Comments

In the final analysis, this research concludes that the legal and political theoretical underpinnings of the Communities should be re-evaluated. The foregoing research concludes that the architect's compromise model offers an accurate model for explaining European integration vis-à-vis the Court of Justice. Moreover, the research is sceptical of attempts to accord the Treaties with the status of a constitution since they simply lack the necessary authority. The research further recognises that establishing such a constitution would give rise to an actual federal state. However, the research registers severe doubts at the conditions necessary to achieve this and even questions the democratic legitimacy of such an act. Therefore, the research suggests that the Communities should remain in their present form and calls for greater objectivity in field with an emphasis on expunging political motivations, and recognising both the strengths and limitations of the Communities. F. Scharpf captures the dynamics of the Communities, reflected by the architect's compromise model, which ensures a continuing bargaining process between the Court and the Member States:

In short, the history of the European Community has not confirmed the hopes of 'Europeanist' politicians and 'neo-functional' theorists alike, for dynamic processes of deepening and widening functional integration, culminating in the creation of a full-fledged federal state; but the European enterprise has proven much more resilient than the 'realist' school of international relations and the political and scholarly promoters of an [*sic*] *Europe des patries* would have predicted. Paradoxically, the European Community seems to have become just that 'stable middle ground between the cooperation of existing nations and the breaking in of a new one.'"³¹

³¹ F. Scharpf, "The Joint Decision Trap: Lessons From German Federalism and European Integration," *Public Administration* 66 (1988): 241.

Appendix

The Architect's Compromise Model

To review the logic of the architect's compromise model, we use the following equation to represent an expected utility function for Court decisions:

$$AEU(a) = \sum_{\text{all } m} p(m)u[o(m,a)],$$

where: $AEU(a)$ ¹ represents the expected utility the Court derives through pursuing action a ;

$p(m)$ ² indicates the probability that a particular state of nature (m), or in this case a particular modified preference by the Member States will prevail; and

$u[o(m,a)]$ denotes the utility that would be derived if outcome o (a function of state of nature m and action a) is achieved.

Furthermore, all of the possible actions, or in this case decisions, available to the Court comprise the set A , which is composed of all the mutually exclusive and exhaustive possible actions available to the Court. Specifically, $A = \{a_1, a_2, a_3\}$, and a_1 denotes a Court decision in favour of deeper integration, a_2 represents a Court decision neither in favour of deeper integration nor in favour of disintegration and a_3 indicates a Court decision in favour of disintegration.

¹ $AEU(a)$ denotes "Architect's Expected Utility of action a ."

² $p(m)$ denotes "probability of modified preference."

Similarly, M is the set of all possible states of nature, or in this case, the attitudes the Member States, that characterise the political, economic and social climate in which Court decisions are made. Thus, M comprises the mutually exclusive and exhaustive set M , where $M = \{m_1, m_2, m_3\}$, and m_1 indicates a condition in which the modified preferences of the Member States reflect pro-integration sentiments, m_2 denotes a condition in which the modified preferences of the Member States are ambivalent to integration and m_3 represents a condition in which the modified preferences of the Member States reflect anti-integration sentiments.

States of Nature (Modified Preferences)

		m_1	m_2	m_3
actions	a_1	O_1	O_4	O_7
	a_2	O_2	O_5	O_8
	a_3	O_3	O_6	O_9

The elements of set O denote all possible consequences of Court decisions taken under differing states of nature, where $O = \{O_1, O_2, O_3, O_4, O_5, O_6, O_7, O_8, O_9\}$ and the following table lists all the elements of O :

- o₁ Member States accept the Court decision, integration deepens
- o₂ Member States accept decision
- o₃ Member States may either reject Court decision outright or alter the Court through Treaty revision
- o₄ Member States accept Court decision but could limit the authority of the Court in the future
- o₅ Member States accept decision
- o₆ Member States may accept Court decision but may alter the authority of the Court in the future
- o₇ Court decision rejected if not consistent with modified preferences, rejection in the form of cheating and/or altering the authority of the Court
- o₈ Court decision accepted
- o₉ Court decision accepted

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